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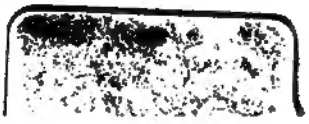

REPORTS

OF

CASES IN CHANCERY,

ARGUED AND DETERMINED

IN

THE ROLLS COURT

DURING THE TIME OF

THE RIGHT HONORABLE

SIR JOHN ROMILLY, KNIGHT,

MASTER OF THE ROLLS.

BY

CHARLES BEAVAN, ESQ., M.A.,
BARRISTER AT LAW.

VOL. XXVI.

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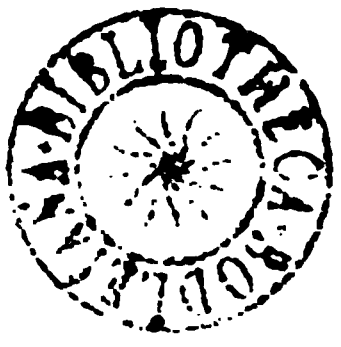

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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

THE ROLLS COURT.

PAYNE *v.* LITTLE.

1858.

June 27, 28.

A wife was entitled to an annuity for her separate use, which was payable out of a mortgage on her husband's estate. The wife lived with her husband and was maintained by him. The wife's trustee neglected to enforce payment of the mortgage and interest, and was held liable for the breach of trust. *Held*, that as between the husband and wife, of her annuity, and that the trustee, as against the wife, was entitled to the benefit of the same equity. But *held* also, that the accruing payment of the annuity could not be set off against a prior existing debt of the husband.

THE testator, Mr. *Preest*, died in 1820, having by his will given an annuity to the Plaintiff, his niece (*a*). In 1821, on her marriage with Mr. *Payne*, these annuities were assigned to trustees for her separate use. Part of the testator's estate consisted of a mortgage of 6,000*l.* on the *Uphill* Estate. This estate was, in 1828, purchased by Mr. *Payne*, the husband of the Plaintiff, who became liable to pay the mortgage of 6,000*l.* He entered into possession of the estate and in receipt of the rents, but he neglected to pay the mortgage interest, out of which his wife's annuity was payable. By this suit, instituted in 1848, Mrs. *Payne* sought to make Mr. *Little*, one of the executors and trustee of her uncle's will, liable for a breach of trust, in

(*a*) 22 *Beav.* 69.

1858.

PAYNE v. LITTLE.

in not getting in the mortgage of 6,000*l.*, and to charge him with that sum and interest, the produce of which would be applicable to the payment of the alleged arrears of her annuity. She succeeded in rendering him liable, and different accounts were directed.

On further consideration, and on a motion to vary the certificate, it was argued, that as, during Mr. *Payne's* possession of the *Uphill* Estate, Mrs. *Payne* was living with and was maintained by him, out of the rents applicable to the payment of her annuity, it must be presumed that her annuity was discharged; for the Plaintiff, who had had the benefit of the rents, could not have any account of the arrears as against her husband, and that the same equity applied in favor of the trustee. That the whole arrears of the annuity must therefore be considered as discharged out of the rents of the estate or the interest on the 6,000*l.* which were charged on it.

On the other hand, it was argued, on behalf of the Plaintiff, that the question here was not one between the Plaintiff and her husband, but between the Plaintiff and her trustee, and that as between them, there was no right of setting off the debt of the husband against the separate demand of the wife. That, at all events, the accruing annuity of the wife could not go to pay off an existing debt due from the husband to the trustee, for the equity contended for proceeded on the assumption that the wife participated in the enjoyment of her separate estate, when applied by her husband to their common benefit; but that this was impossible, if it was applied in paying off an old debt due from her husband. That there was no contract expressed, and that none could be implied, on the part of the wife to pay, out of her separate estate, the debt of her husband.

Mr.

1858.

PAYNE v. LITTLE.

Mr. *Follett* and Mr. *Morris* for the Plaintiff.

Mr. *R. Palmer*, Mr. *Speed* and Mr. *Welford* for Mr. *Little*.

Mr. *Lloyd*, Mr. *Osborne*, Mr. *Bagshawe*, Mr. *Bagshawe*, junior, and Mr. *Roxburgh* for other Defendants.

The MASTER *of the* ROLLS.

I am of opinion, on the facts of this case, that Mr. *Little* is liable for not having got in the 6,000*l.*, and that he must be charged with that sum, and interest from the death of the testator, Mr. *Preest*. The parties settled the amount of interest down to 1828 at 1,200*l.*, and therefore he must be charged with that sum and subsequent interest at 4*l.* per cent.

Then comes his discharge, which consists, in the first place, of 6,410*l.*, the produce of the sale of the estate. In addition to which, I am of opinion that, in taking the account, Mr. *Little* is entitled, in his discharge, to the same right of set-off as Mr. *Payne* would have been entitled to as against his wife if the interest on the 6,000*l.* had been paid to Mr. *Little* and by him back again to Mr. *Payne* while residing with and maintaining his wife. The rights of Mr. *Little* and Mr. *Payne* are co-extensive. I discard from my consideration all circumstances relative to an agreement between the trustee, Mr. *Little*, and the husband, Mr. *Payne*. Such an agreement cannot, in my opinion, affect the question. If Mr. *Payne* had received his wife's annuity, he would be entitled to the benefit of every fair inference, from which a contract or an acquiescence on her part might be assumed, in case of an account being taken between them; and I am of opinion that Mr. *Little* is entitled to

1855.

PAYNE v. LITTLE.

the same benefit in any account to be taken between him and Mrs. *Payne*. If money has been *bonâ fide* and properly employed, it is wholly indifferent, in this Court, whether it has gone through the proper channels and the various stages and steps to arrive at that result: if the hand which was entitled to receive the benefit has really received it, the persons who ought to have first received it and then paid it over cannot be made liable for it. I am therefore of opinion, that to the extent of any arrears of the wife's annuity accruing while living with her husband, she must be treated as having allowed her husband to receive and apply it for their common benefit, and as if their separate incomes had been, by arrangement, applied by the husband for their mutual benefit, instead of the wife's income having, in the first instance, been received by her and then handed over to her husband for that purpose. The Court will not, under such circumstances, inquire into what arrangements have been entered into between the husband and wife, in respect of their separate estates, but will consider the whole as employed for their common benefit. Therefore, to the extent of the accruing payments of the annuity, I am of opinion that Mr. *Little* is entitled to have them set-off against the accruing interest on the mortgage.

Down to 1836, the annuity was paid, and at that time a large arrear of interest was due from her husband. I think that this arrear of the husband's debt cannot be set off against the subsequent sums accruing due for the wife's annuity. I will explain the principle on which I proceed. I assume, upon a rough calculation, that, in 1836, 700*l.* was due from the husband for interest (the amount is immaterial) and the wife's annuity was 400*l.* a-year. I am of opinion, that, from 1836, the 240*l.* a-year which accrued from the rents of the estate,

estate, or the interest of the 6,000*l.* ought to be applied, as far as it will go, in discharge of that annuity of 400*l.* a-year, upon the principle I have already stated; and accordingly, from that period, the Plaintiff is not entitled to claim anything more than the balance of the annuity, namely, 160*l.* a-year out of such funds as may be available for that purpose, if any such there be. But I am of opinion, that neither the husband nor the trustee, standing in his place, is entitled to have the husband's antecedent debt of 700*l.* discharged out of the growing payments of the wife's annuity. It appears to me contrary to principle that the husband's debt should be held to be discharged out of his wife's subsequently accruing annuity becoming due to her *de anno in annum*, unless the wife, in respect of her separate estate, has entered into an express contract to that effect. Such a contract is not to be inferred from her mere silence; it requires something specific and distinct. I am therefore of opinion, with respect to the arrears of interest, that the husband could not set them off against the accruing payments of his wife's annuity, and that the trustee, standing in his place, is not entitled to any such set-off.

NOTE.—It has been decided, in the following cases, that a wife, living with her husband, is not entitled to an account of her separate income paid to her husband without any objection on her part:—*Christmas* v. *Christmas*, *Select Ca. in Ch.* 21; *Bartlett* v. *Gillard*, 3 *Russ.* 149; *Kelly* v. *Dawson*, 2 *Molloy*, 87; *Carter* v. *Anderson*, 8 *L. J.* (*O. S.*) *Ch.* 91; *Thrupp* v. *Harman*, 3 *Myl. & K.* 513; *Leach* v. *Way*, 5 *L. J.* (*N. S.*) *Ch.* 100; *Buckeridge* v. *Glasse*, *Craig & Ph.* 137; *Caton* v. *Rideout*, 1 *Mac. & Gor.* 599; *Howard* v. *Digby*, 2 *Cl. & Fin.* 643, reversing 4 *Simons*, 601; *Hughes* v. *Wells*, 9 *Hare*, 749.

1858.

THE ELECTRIC TELEGRAPH COMPANY OF IRELAND.

COOKNEY'S CASE.

July 19, 20.

A. gave to *B.* a cheque for 50*l.* to obtain fifty shares in a company. *B.* applied for fifty shares, and they were allotted to *A*, and his name was entered in the books, &c. as a shareholder. It did not appear that anything had been done further than that *A.* had refused to sign the deed:—*Held*, that not having repudiated the shares, he was a contributory. *Held*, also, that a change in the company's books in the number of the shares first allotted to *B.* did not relieve him from his liability.

IN *January*, 1852, this company was provisionally registered. In *April* following, Mr. *Carzon*, a director, recommended Mr. *Cookney* to take some shares in it, which he agreed to do, and he gave to Mr. *Carzon* a cheque for 50*l.*, in order to obtain fifty shares. Accordingly, on the 29th of *April*, 1852, Mr. *Carzon* applied for fifty shares, and they were allotted to Mr. *Cookney* on that day. Mr. *Cookney's* name was entered in the company's book for the allotment of shares, in the deed of settlement, in the book called "The Numerical Register of Shares," in the registry of shareholders, and in the registered return of shareholders.

After the allotment, the solicitor of the company called on Mr. *Cookney*, and asked him to sign the company's deed. Mr. *Cookney* said, "he should not sign the deed, that he had never signed but one, and would not sign another." It did not appear that anything further took place on the occasion, but Mr. *Cookney* never signed the deed.

What afterwards took place was left in some obscurity, it did not appear whether any letter of allotment had been sent to Mr. *Cookney*, or that any application had been made to him before the winding-up. He now said, that he considered, by his refusal to sign the deed, he had forfeited his interest in the company, and that he then looked on the 50*l.* as lost. The company was completely

1858.

THE ELECTRIC TELEGRAPH COMPANY OF IRELAND. COOKNEY'S CASE.

pletely registered in *December*, 1852, and an Act of Parliament obtained in *August*, 1853, but the undertaking proving unsuccessful, an order was made on the 31st of *July*, 1854 (*a*), to wind-up the company. The question was, whether Mr. *Cookney* ought to be placed on the list of contributories.

The distinctive numbers, in the company's deed, of the fifty shares allotted to Mr. *Cookney* were from 7,151 to 7,200, in other subsequent books these numbers were found opposite the name of Mr. *Rowbottom*. But in all the company's books, Mr. *Cookney* was entered as the owner of fifty shares, either of the numbers stated, or of those numbered from 12,241 to 12,290.

After the winding-up order, several applications were made by letter to Mr. *Cookney*, but he disregarded them, in consequence of his christian name having been erroneously stated.

Mr. *R. Palmer* and Mr. *Roxburgh*, for Mr. *Cookney*. Mr. *Cookney* is neither a "subscriber" nor a "shareholder" within the meaning of the acts 7 & 8 *Vict.* c. 110; 16 & 17 *Vict.* c. cxxiii. He has, at law, entered into no contract with the company to take these shares, and as Lord *Cranworth* has laid it down, that there is no equitable apart from legal liability; *Bright* v. *Hutton* (*b*), the test of his liability in equity is his liability at law.

The usual mode of obtaining an allotment of shares is to apply in writing for them, and to agree to accept them and sign the deed; there is no case in which a man has been held to be a contributory, unless he has applied for shares in writing, and they have been allotted to

(*a*) 22 *Beav.* 471. (*b*) 3 *H. of L. Cas.* 341.

1858.

THE ELECTRIC TELEGRAPH COMPANY OF IRELAND. COOKNEY'S CASE.

to and accepted by him, so as to make a valid binding contract at law between the parties. This differs from *Yelland's Case* (*a*), in which there had been a complete registration and acceptance of the script. Here, the acts are all those of the directors, Mr. *Cookney* has done nothing to ratify them, and he positively refused to execute the deed or acknowledge his liability, and, ever since 1852, he has repudiated the shares.

Secondly, the specific shares stated to be allotted to him have been transferred to another person, and he cannot be compelled to take other shares, or bear the burthen attached to them.

Mr. *Selwyn* and Mr. *Humphrey* for the Official Manager. Mr. *Cookney* is a contributory; he instructed his friend Mr. *Curzon* to apply for fifty shares, which he did, they were allotted to Mr. *Cookney* accordingly, and were paid for by him. His name is entered as a shareholder in the deed and every book and return of the company; he never repudiated the act of his agent or applied for the return of his money. He was, therefore, entitled to participate in the profits, and the company could not have resisted his claim to a share of them; if so, he is, on the other hand, liable for the losses of the concern, and is a contributory. It is true, that he has not executed the deed, but that is not a requisite for fixing a person with the character of shareholder or contributory, and though he refused to execute the deed, he did not abandon the shares or repudiate the acts of his agent Mr. *Curzon*. In truth he has attempted to play fast and loose, to secure the profits and escape the loss.

Mr. *R. Palmer* in reply.

The

(*a*) 5 *De Gex & Sm.* 395; 21 *Law J.* (*Ch.*) 852.

The MASTER *of the* ROLLS.

1858.

THE ELECTRIC TELEGRAPH COMPANY OF IRELAND. COOKNEY'S CASE.

I consider the first transaction constituted Mr. *Cookney* a contributory; his own evidence establishes this. He constituted Mr. *Curzon* his agent, for the purpose of obtaining and accepting fifty shares, and he furnished him with the money to pay for them. Mr. *Curzon* acted for him, and the fifty shares were allotted to and paid for by Mr. *Cookney*. In that state of circumstances, standing alone, Mr. *Cookney* became entitled to the dividends and subject to the liabilities of a shareholder.

I wish to look at the evidence, in order to see whether his subsequent acts amounted to a repudiation of the shares, and whether it was acted on by the company.

As to the alteration of the shares, that is only material as shewing whether the company acted on any repudiation.

The MASTER *of the* ROLLS.

July 20.

I think Mr. *Cookney* is a contributory. I have looked through the books and the evidence, and the way in which the matter strikes me is this:—I am clear that there was a distinct agreement to become a shareholder, that Mr. *Curzon* was authorized by Mr. *Cookney* to take the shares, that they were allotted to him and so entered in the books of the company, and I find nothing to shew that he ever repudiated them before the order to wind up was made. It is true, that he refused to execute the deed, but even then he did not repudiate the shares.

The evidence is very vague and indefinite as to his subsequent receipt of letters and notices from the company,

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THE ELECTRIC TELEGRAPH COMPANY OF IRELAND. COOKNEY'S CASE.

pany, and it is very difficult to draw any conclusion from it; but it is to be observed, that the Official Manager could not prove all the notices which the company had sent to all the various persons, and the matter rests solely on the cross-examination of Mr. *Cookney* himself, which contains nothing positive on the subject.

Mr. *Cookney* also attempts to escape being made a contributory, on the ground of an alteration having been made in the shares, and on looking at the books, it appears that the shares originally allotted were transferred to other persons, and new ones given to him. If this had been done in consequence of his refusing to execute the deed, I should take the transfer as evidence that the company had acted on his repudiation. That is not the case, they always kept him on the list, and I do not find any list in which his name is not entered. Finding no distinct repudiation, and this objection not having been mentioned until after the question occurred, I think he is to be treated as a contributory.

I proceed on *Yelland's Case* (*a*).

(*a*) 5 *De Gex & Sm.* 395.

NOTE.—*Cookney* afterwards appealed, but the *Lords Justices*, on the 3rd of *November*, 1858, refused his motion, with costs.

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BROWN *v.* TRUMPER.

July 17, 19.

Demise for seven years, with a proviso, that, notwithstanding anything before contained, if notice should not be given to determine the lease at the end of the seven years, it should be considered a lease upon the same covenants, from year to year, until notice to determine it. *Held*, that the demise continued after the seven years until put an end to by notice, and that the covenants continued binding.

Covenant by farm tenant "well and substantially" to repair and keep in "good substantial repair," and so "well and substantially repaired" to yield up at the end of the term: *Held*, that the tenant was bound to give up the premises in as good a state of repair as when he took possession, and that they must be inferred to have been then in a tenantable state. The landlord having become changed during the term, and a claim for dilapidations being now made by the existing landlord, held, that the tenant was entitled to an inquiry as to the state of repair when the present landlord's title accrued.

IN *September*, 1805, Sir *Charles H. Palmer*, by deed, demised a farm to *Trumper* for seven years, at a rent of 528*l.*, and *Trumper* covenanted with Sir *Charles H. Palmer* that he would, at all times during the continuance of the said demise, at his and their own costs and charges, when, where and so often as need should be and require, and particularly if solicited so to do by the said Sir *Charles H. Palmer*, his heirs or assigns, by notice in writing, in forty days after every such notice, *well and substantially repair*, uphold, scour, cleanse, amend, maintain *and keep in good substantial repair* all the said demised messuages or tenements, outhouses, edifices, buildings, barns, stables, hedges, ditches, *Thames* banks, gates, stiles, posts, rails, walls and mounds of and belonging to the said demised premises, *and the same* premises being *so well and substantially repaired*, cleansed, scoured and kept, *at the end* or other sooner determination *of the said term* of seven years, should and would, peaceably and quietly, leave and *yield up* unto the said Sir *Charles H. Palmer*, his heirs and assigns.

The lease contained a proviso, that for and notwithstanding anything thereinbefore contained to the contrary,

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trary, and in case six months' notice in writing should not be given by one of the parties thereto to the other, or their legal representatives, for the ending and determining of the said lease at the expiration of the seven years thereby demised, that afterwards the same lease should be considered as a lease upon the same covenants, provisoes, exceptions and agreements as were therein contained, *from year to year*, until six months' previous notice in writing should be given or left by Sir *Charles H. Palmer*, his heirs or assigns, at the dwelling-house of the said *William Trumper*, his executors or administrators or assigns, or at the dwelling-house thereby demised, or should be given by the said *William Trumper*, his executors or administrators, to the said Sir *Charles H. Palmer*, his heirs or assigns, to quit at a *Michaelmas* in any year after the expiration of the thereby letten term of seven years.

By a memorandum endorsed on the lease, three cottages, with their appurtenances, were added to the demise, at an additional rent of 12*l.* 12*s.*

In *March*, 1812, before the expiration of seven years, articles of agreement were entered into between the two parties, whereby the tenant agreed to pay an additional rent, making 747*l.* 12*s.* in the whole, and Sir *Charles* agreed not to give notice to quit previous to *September*, 1819. The rent received afterwards varied in 1820 and 1832, but it did not appear under what circumstances.

Sir *Charles* devised this property to *John Palmer* for life, with remainder to his first and other sons in tail (which failed), with remainder to *Henry Palmer* for life, with remainder to his first and other sons in tail.

Sir

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Sir *Charles Palmer* died in 1838. *John Palmer* then entered into possession, and died in 1852. *Henry Palmer* entered into possession, and he and his son barred the entail.

Trumper, the tenant, died in *January*, 1854, and immediately after *Henry Palmer* gave his administratrix notice to quit.

The estate of *Trumper*, the tenant, was administered in this suit, and *Henry Palmer* carried in a claim of 390*l.* for dilapidation, on the ground that the tenancy continued from 1805 to 1854 under the original lease. One of the items of the estimate was for 125*l.* for restoring one four-roomed cottage, which had fallen down twenty-three years ago, and which the evidence stated to have been in a very dilapidated state at the commencement of the tenancy. This claim was adjourned into Court.

There was some evidence of a claim having been made by *Henry Palmer* for dilapidation against the estate of his brother *John Palmer*.

Mr. *Selwyn* and Mr. *Lewis* for Mr. *Henry Palmer*. A tenant holding over at the expiration of a written lease holds under the same covenants, and the advance of rent makes no difference; *Digby* v. *Atkinson* (*a*). The Statute of Limitations is set up, but it is inapplicable, for there was a continuing breach of the covenant, and the breach of the covenant to yield up in substantial repair took place at the end of the term.

Mr. *W. R. Ellis* for the administratrix. There was a legal

(*a*) 4 *Campbell*, 275.

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a legal demise for seven years only, and a new tenancy commenced under the agreement of *March*, 1812. Besides, the variation of the rent, from time to time, also affords a presumption that there was a new tenancy. The additional term is, therefore, under the agreement, and not under the lease. If so, the tenancy was not created by an instrument under seal, and the benefit of the covenant did not pass to the assignee of the reversion, and therefore *Henry Palmer* cannot sue, for the statute of 32 *Hen.* 8, c. 34, only applies to cases of demises by deed; *Standen* v. *Christmas* (*a*).

The tenant holding over was not liable on an implied contract to put the premises in repair, and, if he were, he would be only liable to place them in a tenantable state of repair, having regard to their state and condition when the claimant's title accrued; the benefit of all former breaches belonged to his predecessors in the estate. The case is like *Johnson* v. *The Churchwardens of St. Peter's, Hereford* (*b*), where "*A.* demised to *B.*, for a term of years, two messuages; the lease contained a covenant by *B.*, that he would, during the term, keep the premises in repair and leave them, at the end of the term, in good repair, and in the same state as they were in at the beginning. At the end of the term, the messuages were out of repair, and had been converted into a single house. *B.* held on without a fresh lease, and *C.* afterwards purchased the reversion of *A.*, and *B.* continued to hold on under *C.* It was held, first, that *B.* was not liable in assumpsit, on an implied contract to put the messuages in such repair, and in the same state as they were in at the commencement of the term; and secondly, that, supposing *B.* so liable, *C.* had no right

(*a*) 10 *Q. B. Rep.* 135. (*b*) 4 *Ad. & Ell.* 520.

right of action for breaches of the contract committed before he purchased the reversion."

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In *Stanley* v. *Towgood* (*a*), it was held, that a covenant to keep and leave a house in repair was satisfied by keeping it in substantial repair according to the nature of the building, and, with a view to determine the relative sufficiency of the repair, the jury might inquire whether the house was new or old at the time of the demise.

Here the tenant's estate cannot be liable to do more than to place the premises in the same state of repair as they were when Mr. *Henry Palmer's* title accrued in 1852.

The MASTER *of the* ROLLS.

I should like to read the lease; my impression at present is, that this was a demise for seven years certain, and for so much longer as they should think fit, with liberty to either party to put an end to it.

At a subsequent period, the landlord arranged not to give notice to quit before *September*, 1819, but the original demise went on as long as the tenant remained in possession, and the burden of proving that it was put an end to lies on the tenant.

I am of opinion that the covenant to repair continued to the end of the demise, and that the tenant was bound at that time to give up possession of the premises in as good a state of repair as when he took possession. I infer that it was then in a tenantable state of repair; the expression is vague, but is well understood.

I should

(*a*) 3 *Bing. N. C.* 4.

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I should therefore hold, that, at the end of the term, he was bound to deliver up the premises in a tenantable state of repair. His administratrix may go into evidence as to amount of the liability of the tenant's estate, or as to the state of repair in 1852, when the claimant's right accrued. I am satisfied, that if an old barn were pulled down and a new one erected, the tenant would be bound to deliver it up; but if the tenant pulled down a barn, and the landlord took no notice of it for a number of years, I should infer, either that it had been done with the permission and free will of the landlord, or that he had waived the breach of covenant.

I think the landlord is entitled to charge the tenant's estate with such a sum as is necessary to put the premises into a proper tenantable state of repair.

July 19. *The* MASTER *of the* ROLLS adhered to his opinion.

WHITE *v.* WAKLEY. (No. 1.)

July 6, 12.

Under a lease of a farm, the tenant was bound to keep in repair the buildings to be erected thereon. During the term, the tenant, with the permission of the landlord, who was lord of the manor, built a house on the waste adjoining the farm, and he enjoyed it with the farm.

Held, that the tenant was also under an obligation to keep this house in repair.

BY a lease, dated in *July*, 1798, a certain messuage, dwelling-house and farm were demised for a term of ninety-nine years, if three persons or any of them should so long live, at a yearly rent of 2*l*., and a heriot on the death of each of the lives. The lessee covenanted to pay the rent, and that he, his heirs, executors, &c., should and would, at his and their own costs and expenses, from time to time and at all times during the term thereby granted, *well and sufficiently repair*, uphold, sustain and maintain the said demised premises, and every part thereof, and all erections, buildings, hedges and fences to be erected and built on the same premises, or any part thereof, and the same premises, so well and sufficiently repaired, upheld, sustained and maintained, and in good and substantial repair, in all things whatsoever, at the end or sooner determination of the said term, should and would peaceably and quietly leave and yield up unto the said lessor, his executors, administrators or assigns, without doing thereon any manner of waste, spoil or injury whatsoever.

The lease determined by the death of the testator in the cause, *Francis Newbery*, who remained tenant down to his death.

It appeared that in 1803, *Francis Newbery*, with the sanction or permission of the landlord, who was lord of the manor, built a house and farm buildings on the waste adjoining the farm, which were held and enjoyed by the tenant down to the termination of the lease.

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At the expiration of the lease, the premises were out of repair, and the landlord claimed a sum of 124*l.* 2*s.* in respect of the dilapidations, and the question was, whether the estate of the tenant Mr. *Newbery* was liable for the dilapidations, in respect of the house and farm buildings erected in 1803 on the waste, and not comprised in the demise.

Mr. *Selwyn* and Mr. *Sandys* for the landlord. The tenant, having built the house with the assent of the landlord, held it upon the same terms as the rest of the property demised. In equity, the additional property became included in the lease, and the parties became entitled to the same rights and subject to the same liabilities, in respect of it, as those affecting the property specifically demised. The tenant was in the same situation as one holding over after the expiration of a lease, in which case, he holds subject to the same rent and covenants.

The tenant was, therefore, bound to keep the house and buildings in repair, and his estate is now liable for the amount of dilapidations.

Mr. *C. C. Barber* for the Plaintiff. A party in possession of land not comprised in his lease is a mere tenant at will, and he may be turned out at any moment.

Mr. *Follett* and Mr. *Hanson* in the same interest. The tenant was not liable for buildings not comprised in his lease, he has entered into no obligation, and no contract ever existed with respect to them which this Court could have enforced, the Statute of Frauds alone would have presented a complete obstacle.

If

If the house had been built by the landlord, it might have been reasonable for the tenant to keep it in repair, but here it was built by the tenant, and it would not be equitable to compel him to rebuild a house voluntarily erected by him.

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Mr. *Selwyn* in reply.

The following cases were relied on:—*Doe* d. *Harrison* v. *Murrell* (*a*); *Doe* d. *Lewis* v. *Rees* (*b*); *Yem* v. *Edwards* (*c*); *Doe* v. *Pearsey* (*d*); *Bryan* v. *Winwood* (*e*); *Doe* v. *Jones* (*f*); *Douse* v. *Earl* (*g*); *Dann* v. *Spurrier* (*h*); *The Master of Clare Hall* v. *Harding* (*i*); *Powell* v. *Thomas* (*k*).

The MASTER *of the* ROLLS.—I will consider this case.

The MASTER *of the* ROLLS.

This is a motion to vary a certificate. *July* 12.

The facts are these:—In *July*, 1798, there was a demise, not including the land in question, and the tenant covenanted to repair and keep in repair the buildings erected and to be erected. In 1803, the tenant, with the sanction or permission of the landlord, who was lord of the manor, built a house and farm buildings on the waste adjoining the farm, and held them with the farm until the termination of the lease, which expired with the death of the tenant, who was also the testator,

(*a*) 8 *Car. & P.* 134.
(*b*) 6 *Car. & P.* 610.
(*c*) 1 *De Gex & Jones*, 598.
(*d*) 7 *Barn. & Cr.* 304.
(*e*) 1 *Taunt.* 208.
(*f*) 15 *Mee. & W.* 580.
(*g*) 3 *Levinz*, 264.
(*h*) 7 *Ves.* p. 235.
(*i*) 6 *Hare*, 273.
(*k*) 6 *Hare*, 300.

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testator, *Francis Newbery*. The landlord now insists, that Mr. *Newbery's* estate is liable to put this house and buildings into repair; but his representative insists that this land was not included in the covenant, that *Francis Newbery* was merely tenant at will, and that nothing is due from his estate in respect of it.

At law, the estate of the testator would certainly not be liable; the land is not included in the covenant, and an action of covenant would produce nothing.

But this is not, in my opinion, conclusive of the matter. The question is, whether there was not an implied contract between the landlord and the tenant, that the land so occupied and the buildings erected upon it should be treated as part of the original demise, and subject to the same conditions. There was nothing in writing; all that appears is, that the land and the buildings on it were held with the original land demised, until the end of the term.

In order to test this case, I have thought it proper to consider what this Court would have done, if the landlord had, immediately after the house and buildings had been erected on the waste, sought to evict the tenant, and to claim the benefit of the erections for his own use and benefit. Upon the principle of *Dann* v. *Spurrier* (*a*); *Powell* v. *Thomas* (*b*), with the limitations imposed upon it by *The Master of Clare Hall* v. *Harding* (*c*), I entertain no doubt, that this Court would have interposed, by injunction, to prevent the landlord from obtaining the possession and benefit of the house and buildings which he had thus permitted to be erected. I then put this question:—at what period would the right of

(*a*) 7 *Ves.* 235. (*b*) 6 *Hare*, 300. (*c*) 6 *Hare*, 273.

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of the tenant to call on this Court to prevent the landlord from evicting him have expired? could this Court have said one year, or two or three, or more? could it have arrived at any conclusion by fixing what may be called a reasonable time? Obviously it could not. It would have held, that the implied contract and the implied permission was for the period of the demise. Again, if the landlord had insisted on rent being paid for the use and occupation of the house and buildings, after having allowed the tenant to occupy it for many years without paying any rent, would this Court have empowered or permitted the enforcement of the payment? I think not; it would have said, that the dealings between the parties shew what the contract was between them, and that such course of dealings was not now to be changed. But then this question naturally follows, is all the advantage to be on one side? Is it to be implied, from the permission to build by the landlord, that the tenant was to hold it during the terms of the original lease, and that he was to pay no rent for it, and yet that he might let it tumble down, and at the end of the term deliver up the waste encumbered with useless rubbish? Again, could the tenant have pulled down the house, and sold the materials at any period of the term, and would this Court have refused an injunction at the instance of the landlord to prevent such destruction? I think these questions must be answered in the negative. I think that the reason why this Court would have restrained the eviction of the tenant as soon as it was built is this: —it would have treated the permission of the landlord to build as equivalent to a permission, on his part, that the thing built should be treated as part of the original demise, and the Court, so treating it, would also have treated the act of the tenant, by building on and holding the other property, as an engagement, on his part, that

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that it should be treated as part of the land originally demised.

If so, that settles the question, for I cannot, in favor of the tenant, hold, that it is to be treated as part of the original demise, and that the landlord can neither recover possession of it before the expiration of the term, nor demand any additional rent for it, and deny, in favor of the landlord, that all the conditions, covenants and agreements which apply to the property originally demised, do in equity apply also to that which is added to and treated as part of it.

What order ought this Court to have made, if, as soon as the house was built, the landlord had sought to recover possession? This Court would, in my opinion, have restrained him from recovering possession, on the ground that, as between him and his tenant, this land was to be treated as part of the land originally demised: so treating it, I also consider it to be subject to all the same obligations, and clothed with all the same advantages as were to be found in the original indenture of demise.

I think, therefore, that the certificate is wrong, and that a proper allowance ought to be made for the dilapidations of the house and buildings.

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WHITE *v.* WAKLEY. (No. 2.)

July 12, 15.

A testator gave 2,000*l.* in remainder to his sisters, except *A.*, and he then gave a legacy to *A.* He afterwards gave "to each of his sisters, namely, *B.*, *C.* and *D.*, 500*l.*" each, "and in case of death of either, their portion to go to the surviving sisters above mentioned. *Held*, that *A.* was not included among the surviving sisters.

THE testator gave to his brother, *Joseph Newbery*, the interest of 2,000*l.* for life, and, at his decease, to be equally divided between his (the testator's) sisters, except his sister *Sarah*. He then gave to his said sister *Sarah* the interest of 1,000*l.* for her life, with remainder over, and then proceeded as follows:—"to each of my sisters, namely, *Mary Ann*, *Charlotte* and *Betsey*, I give and bequeath 500*l.*, making 1,500*l.*, and in case of death to either, their portion *to go to the surviving sisters above mentioned.*"

Charlotte died in the testator's lifetime, whereby her legacy of 500*l.* became payable to "the surviving sisters above mentioned;" and the question was, whether those surviving sisters consisted of *Mary Ann* and *Betsey*, who were the only other sisters mentioned in that clause, or whether the gift extended to *Sarah*, who was mentioned in the preceding part of the will.

Mr. *Hardy*, for *Sarah*, contended that she was one of the surviving sisters, and was "*above* mentioned," and that therefore she participated.

Mr. *C. Hall*, *contrà*, argued that the words "above mentioned" referred to the last antecedent gift to the three sisters, placed under a *videlicet*, and that *Sarah* was excluded.

The MASTER *of the* ROLLS reserved his judgment.

The

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July 15.

The MASTER *of the* ROLLS.

I am of opinion that *Sarah* is excluded, and that "the surviving sisters" meant the survivors of *Mary Ann*, *Charlotte* and *Betsey* only. When a testator gives money to several named individuals, and, if any should die, then to the survivors, the gift by survivorship would, *primâ facie*, apply to the class to whom it is given. Here the testator has provided for *Sarah* separately and distinctly from his other sisters; but if he had said simply, I give 1,500*l.* to *Mary Ann*, *Charlotte* and *Betsey*, and "in case of death to go to the surviving sisters," I should have had no doubt. The only doubt is created by the words "above mentioned." I think, however, that it means the same thing, viz., "the surviving sisters I have last above mentioned," and that these words do not extend to *Sarah*.

HUGHES *v.* JONES.

July 8, 13.

Decree made on motion allowed to be varied on motion and without a petition of appeal.

A vendor filed a claim for specific performance, and gave notice of motion for a decree. The Defendant did not appear, and a decree was made against him, directing a specific performance, without any reference as to title. Subsequently, upon the motion of the Defendant, the Court allowed a reference as to title to be inserted in the decree, upon his paying all the costs of the application.

THIS was a claim by a vendor for specific performance, but raising no question as to the acceptance of title. At the hearing, in *April* last, the Defendant did not appear, and an absolute decree was thereupon made against him for a specific performance with costs. The Defendant attended the Registrar on the drawing up of the decree.

Mr. *R. Palmer* and Mr. *C. F. Simpson* now moved that the cause might be reheard, and that a reference as to title might be inserted in the decree, and that the Plaintiff's

Plaintiff's costs of the suit might be reserved. They cited *Tripp's Forms* (*a*); *Clive* v. *Beaumont* (*b*); *Gaston* v. *Frankum* (*c*).

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Mr. *Selwyn* and Mr. *F. Webb*, for the Plaintiff.

A decree cannot be altered on motion, there must be a petition of rehearing signed by two counsel and a deposit made. The Defendant, after the decree had been pronounced, attended at the Registrar's office and acquiesced in the form in which it was drawn up; and the Registrar is of opinion that a reference as to title is never made, unless asked by the purchaser at the hearing. [*The* MASTER *of the* ROLLS.—I do not think the Plaintiff wrong in taking a decree in this form.] The Defendant might have obtained a reference at any time, and he has waived that right by his conduct and by his default. They cited *Flower* v. *Gedye* (*d*).

The MASTER *of the* ROLLS.

I am of opinion that the Defendant is entitled to have the case reheard and to have a reference as to title on payment of all the costs of this application. I will reserve my opinion as to the costs incurred down to the first hearing; but the affidavit filed since the first hearing must not influence my judgment as to these costs.

The MASTER *of the* ROLLS.

I have read the affidavits and am satisfied that if, when the case came before me in the first instance, it had been argued on both sides, I should not then have given the Plaintiff the costs of the suit. I suspect that this

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(*a*) *Page* 64.
(*b*) 1 *De G. & Sm.* 397.
(*c*) 2 *De G. & Sm.* 561.
(*d*) 23 *Beav.* 449.

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this is one of those cases in which a person desirous of buying a piece of land, bids for it without the means of paying for it: in which case, the state of the law enables him to obtain time by interposing a great number of difficulties. I cannot, however, act on this suspicion.

All I can do is to reserve the costs until the case comes before me. Therefore, upon the Defendant paying the costs of this motion, I will alter the decree made at the first hearing of this claim, by directing the usual reference as to title and by reserving the Plaintiff's costs of the original hearing.

KING *v.* CLEAVELAND. (No. 1.)

July 1, 2.

Gift to "legal personal representatives share and share alike" *Held* to mean next of kin.

Rules for construing gifts by substitution.

Gift to one for life, and after his decease, to his children "then living, or their legal personal representatives, share and share alike." *Held*, that the representatives took as a distinct class and not by substitution, and that the representatives of children who died in the lifetime of the testator, and of those who were dead at the date of the will, participated.

THE testator, by his will dated in 1841, bequeathed a sum of 4,000*l.* Three and a half per cents. to trustees, upon trusts which he declared in the following terms:—"Upon trust to stand possessed thereof, and to pay and apply the interest and dividends thereof to and for the use and behoof of my brother *Richard Francis Cleaveland*, and his wife *Eliza Cleaveland*, and the survivor of them, for his and her natural lives; and after the decease of my said brother and his said wife, then in trust to pay and apply the said sum of 4,000*l.* Stock equally amongst my nephews and nieces (children of my said brother *Richard Francis Cleaveland* and his said wife) *then living, or their legal personal representatives, share and share alike.*"

The testator died in 1844; his brother *Richard Francis* died in 1849, and his wife in 1857.

Richard

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Richard Francis Cleaveland and his wife had seven children, namely, *Richard* and *Henrietta*, who died in 1843, in the lifetime of the testator, *George*, who died in 1855, and four others. *Richard* and *George* left children, who were Defendants, but *Henrietta* left none.

The bill was filed to have the construction of this bequest declared.

Mr. *Wickens*, for the Plaintiffs.

Mr. *R. Palmer*, Mr. *C. Hall*, and Mr. *C. Webster*, argued the following points:—First, whether the word "or" was to be read "and;" *Richardson* v. *Spraag* (*a*); *Shand* v. *Kidd* (*b*); *Maude* v. *Maude* (*c*).

Secondly, whether the words "legal personal representatives" were words of limitation.

Thirdly, whether, as representatives, the executors or administrators took the legacy as part of the estate of the testator or intestate; *Long* v. *Watkinson* (*d*); *Daniel* v. *Dudley* (*e*); *In re Crawford's Trusts* (*f*); *In re Porter's Trusts* (*g*); *Jacobs* v. *Jacobs* (*h*). They also cited *Archer* v. *Jegon* (*i*); *Topping* v. *Howard* (*k*); *Holloway* v. *Radcliffe* (*l*); *Bullock* v. *Bennett* (*m*).

The MASTER *of the* ROLLS said he could not get over the principle acted on in *Baines* v. *Ottley* (*n*), and by

(*a*) 1 *P. Wms.* 433.
(*b*) 19 *Beav.* 310.
(*c*) 22 *Beav.* 290.
(*d*) 17 *Beav.* 471.
(*e*) 1 *Phillips*, 1.
(*f*) 2 *Drew.* 230.
(*g*) 4 *Kay & J.* 188.
(*h*) 16 *Beav.* 557.
(*i*) 8 *Sim.* 446.
(*k*) 4 *De G. & Sm.* 268.
(*l*) 23 *Beav.* 163.
(*m*) 7 *De G., M. & G.* 283.
(*n*) 1 *Myl. & K.* 465.

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by Vice-Chancellor *Wigram* in *Smith* v. *Palmer* (*a*), which was also recognized by Vice-Chancellor *Kindersley* in his judgment in *Crawford's Trusts* (*b*); that where "representatives" were to take, "share and share alike," it was inconsistent with the notion, either that "executors or administrators could be meant, or that "representatives" were words of limitation. That he must come to the conclusion that the next of kin were entitled, and that they took in equal shares. His Honor then required the other points to be argued.

Mr. *Follett* and Mr. *Osborne*. The representatives of *Richard* and *Henrietta*, who died in the lifetime of the testator, do not participate in the gift. This is a legacy to a class of nephews and nieces, and no persons can take by substitution for one who was not living at the death of the testator. The rule is thus laid down in *Ive* v. *King* (*c*). "If a testator give a legacy to a class of persons, such as the children of *A*., and goes on to provide, that in case of the death of any one of the children of *A*. before the period of distribution, the issue of such child shall take their share, such issue cannot take, unless the parent might have taken, and consequently, if a child of *A*. be dead at the date of the will or at the death of the testator, the issue of that child cannot take anything."

This rule was approved of in the case of *Re Porter's Trust* (*d*). Vice-Chancellor *Wood* there says, "The proposition in *Ive* v. *King* is very simple and well established, viz. that where there is a bequest to a class, followed by a substitutional

(*a*) 2 Hare, 230.
(*b*) 2 Drew. 390.
(*c*) 16 Beav. 52.
(*d*) 4 Kay & J. 191.

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a substitutional bequest, in case of the death of any member of the class, there, to determine whether the substitutional bequest is to take effect upon the death of any particular individual, you must first inquire whether he was a member of the class at all. If he was not, it is impossible to predicate substitution with respect to him."

The fund is therefore divisible into fourths.

Mr. *Lloyd*, for the two children of *Richard*, who died in the testator's lifetime. The rule, that where issue or children are substituted for a parent, the issue or children cannot take by substitution, unless the parent was himself within the class, was laid down in *Christopherson* v. *Naylor* (*a*), but that was a case where the parent was dead at the date of the will. Here *Richard* was alive at the date of the will and the rule does not apply. *Smith* v. *Smith* (*b*) is in point. There, a child, who was living at the date of the will, died in the testator's lifetime: it was held, that his issue might take by substitution. *Rust* v. *Baker* (*c*); *Gray* v. *Garman* (*d*).

The Court leans to the construction which will include as many objects as possible; *Bouverie* v. *Bouverie* (*e*); and it even considers a child while *in ventre sa mère* as one living at that time; *Clarke* v. *Blake* (*f*).

Mr. *Teed* and Mr. *Martelli*, for *Richard's* widow and her trustees. The representative of *Richard* took a share

(*a*) 1 *Mer.* 320.
(*b*) 8 *Sim.* 353.
(*c*) 8 *Sim.* 443.
(*d*) 2 *Hare*, 268.
(*e*) 2 *Phillips*, 349.
(*f*) 2 *Bro. C. C.* 320.

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a share by substitution; *Gittings* v. *M'Dermott* (*a*); *Le Jeune* v. *Le Jeune* (*b*); for *Richard* was living at the date of the will, and he is mentioned by name in several parts of the will. Under this gift, any nephew living at the date of the will might have taken, if he had happened to have survived the testator, therefore, in case of their deaths, their representatives take in their place. If every one of the nephews and nieces had died in the life of the tenant for life, there would not have been a lapse of the 4,000*l.* legacy.

Mr. *Hobhouse* for Mr. *St. Barbe*, the surviving husband and legal personal representative of *Henrietta*. *Christopherson* v. *Naylor* (*c*), *Tytherleigh* v. *Harbin* (*d*) and *Ive* v. *King* (*e*) do not apply to the case; it is governed by *Coulthurst* v. *Carter* (*f*). Here the "personal representatives" are distinct objects of the gift. The sentence is very inaccurate as it stands and must be expanded into two classes. A testator, speaking of his nephews and nieces, must *primâ facie* have had those who were living in his contemplation; but here the other alternative evidently presented itself to his mind of some being dead, and this he has provided for by giving their shares to their legal personal representatives, who are as much objects of the gift and of his bounty as the nephews. He no doubt intended to prevent a lapse.

The MASTER *of the* ROLLS.

July 2. I think the principles on which these cases rest are now perfectly well ascertained, and I see nothing to qualify

(*a*) 2 *Myl. & K.* 69.
(*b*) 2 *Keen*, 701.
(*c*) 1 *Mer.* 320.
(*d*) 6 *Sim.* 329.
(*e*) 16 *Beav.* 46.
(*f*) 15 *Beav.* 421.

qualify what I said in the two cases of *Ive* v. *King* (*a*) and *Coulthurst* v. *Carter* (*b*), in both of which, although they are not printed in the same volume, I gave judgments on the same day, in order to point out the view I took in the two cases. It is but repeating what is to be found in those cases, when I say, that no person can take by substitution for a member of a class, unless their parent could, under the terms of the will itself, himself have taken as a member of that class. But that rule does not apply where the first gift is to named individuals, because there it is expressly intended that the substitution shall take place in order to prevent a lapse. I agree that *Coulthurst* v. *Carter* is more applicable to the question to be considered here than *Ive* v. *King* (*a*) and *Smith* v. *Smith* (*c*). *Gray* v. *Garman* (*d*) points out the distinction which it is important to be noticed, that the persons did not take by substitution, but as objects forming another separate and distinct class.

The distinction is well expressed by Sir *James Wigram* in *Gray* v. *Garman* (*d*) in the passage in which he says, "if the entire clause is to be read as containing an original and substantive gift to two classes of legatees, namely, 1st, to brothers and sisters living at the death of the wife, and, 2ndly, to the issue of brothers and sisters who may be dead at the time of the death of the wife, there is nothing in the description of the second class to prevent the issue of *John* from taking (though he were dead when the will was made)." So, in *Smith* v. *Smith* (*c*), it is obvious that the child of a son who had died did not take by substitution, as has been sometimes

(*a*) 16 *Beav.* 46.
(*b*) 15 *Beav.* 421.
(*c*) 8 *Sim.* 353.
(*d*) 2 *Hare*, 268.

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times erroneously supposed, but as the object of a separate and distinct class. There were two classes; one was the class of children who survived the wife and the other was the issue of such children as should happen to die in the lifetime of the wife; and the Vice-Chancellor held, that there was nothing to limit the gift to the issue of those children who happened to die in that portion of his wife's life which elapsed after the death of the testator and the division of the fund.

So, in *Coulthurst* v. *Carter* (a), I held that the children took as specified objects of a particular gift, and not by way of substitution.

Now, applying those rules to the present case, the real question is this:—Is there one class or are there two classes? If there be one class only of nephews and nieces, they must be ascertained at the death of the testator; and unquestionably no representative of any deceased nephew or nieces can take, unless the nephew or niece had survived the testator. But if the true construction of this bequest be this, that the nephews and nieces who survived the tenant for life are one class, and the representatives of the deceased nephews and nieces another class, then there is nothing whatever to limit the decease of the nephews and nieces to the period between the death of the testator and the period of distribution.

The view that I take of this case is, that there are two distinct classes, first, the nephews and nieces who were then living, and, secondly, the representatives of such of the nephews and nieces who shall have died who are to take "share and share alike." I hold that these

(a) 13 *Beav.* 421.

these words, "legal personal representatives," include the representatives of all the nephews and nieces, not only those living at the date of the will, but those who had died previous to that period, and this is in accordance with *Coulthurst* v. *Carter* (*a*).

The result of my decision will be, that the fund will be divided into seven shares instead of into four. Each of the four survivors will take one-seventh, and the representatives of the three who are dead will each take one-seventh between them.

Mr. *Wickens:* Then your Honor divides the fund into seven shares, and construes the words "legal personal representatives" as the next of kin living at the death.

The MASTER *of the* ROLLS: Yes, at the deaths of the nephew or niece.

(*a*) 15 *Beav.* 421.

STRINGER *v.* HARPER.

July 9.

A. B. mortgaged estate *X.* for 800*l.*, and, on the same day, he charged estate *Y.*, in aid, to the extent of 200*l.* *A. B.* died, having devised estate *Y.*, but intestate as to estate *X.* *Held*, that the whole 800*l.* was, as between the devisees and heir, primarily chargeable on estate *X.*

ON the 24th of *May*, 1848, the testator conveyed "the *Miners' Arms* Estate" to mortgagees in fee, for securing the repayment of 800*l.*

Upon the same 24th of *May*, 1848, the testator deposited the title deeds and muniments of title of his *Stone Street* Estate with the same mortgagees, and he signed a memorandum of that date, which, after reciting that the testator was seised or entitled to the *Stone Street* Estate, and that the mortgagees had, that day, advanced

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advanced to him 800*l.*, for security thereof he had, by indenture of even date, assured the *Miners' Arms* Estate to them, by way of mortgage thereon, proceeded as follows:—And whereas, on the treaty for the said advance, it was agreed that I should deposit the deeds and writings relating to my title to the premises in *Stone Street* with the said mortgagees, "for further and better securing the repayment of the said mortgage debt, to the extent of 200*l.* and interest, and I have accordingly this day deposited the same deeds and writings with" them; he then declared, that he had deposited the deeds relating to the premises in *Stone Street* with the mortgagees, as a security for and payment to them of the 200*l.* (part of the 800*l.* so due and owing to them as aforesaid), together with interest thereon, and he then charged the premises in *Stone Street* with the payment of the sum of 200*l.* and interest, and undertook, when required, to make and execute to the mortgagees a regular and valid mortgage in fee of the premises in *Stone Street*, for securing the payment of 200*l.* and interest.

The testator, by his will dated in 1855, exempted his personal estate from the payment of his just debts, and he devised his *Stone Street* Estate to the Plaintiff and his heirs, in trust for certain persons.

The testator died in 1856, intestate as to the *Miners' Arms* Estate.

The question was, whether the testator's mortgage debt of 800*l.* should be wholly paid out of the *Miners' Arms* Estate, or whether the *Stone Street* Estate should contribute to the extent of 200*l.*

Mr. *A. C. Morton*, for the Plaintiff, argued that the

the whole 800*l.* mortgage was payable primarily out of the *Miners' Arms* Estate. He cited *The Marquis of Bute* v. *Cunynghame* (*a*); *Nicholas* v. *Southwell* (*b*); and the 17 & 18 *Vict. c.* 113.

The MASTER *of the* ROLLS: At present, I think this act has no application to this case, it only means that the personal estate shall not be applied in paying off a mortgage on the real estate.

Mr. *C. T. Simpson, contrà*, argued, that the *Stone Street* Estate ought to bear 200*l.* of the mortgage debt of 800*l.*, for to that extent both estates were liable.

Mr. *W. J. Bovill*, for other parties.

The MASTER *of the* ROLLS.

I concur with the Plaintiff. I think that the question depends on the construction of the two written instruments of even date, and not on the act which has been cited.

The *Miners' Arms* Estate was primarily charged, and the second estate was only pledged, in aid of the first, for part of the debt charged on it. The *Miners' Arms* Estate must, in the first instance, bear the whole.

(*a*) 2 *Russ.* 275. (*b*) *Moseley*, 177.

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KELLY v. HAMMOND.

July 9.

Bequest to "A and her daughters" equally. A. had an illegitimate daughter at the date of the will and never had any other daughter. A. predeceased the testator. Held, that illegitimate daughters were paid under this bequest, and that the construction was not altered by the circumstance, that, in the same will, there was a bequest to B and her son John, the son John being illegitimate.

THE testator *Thomas Feenys*, by his will dated in 1852, devised a freehold to trustees for sale, and he directed them to divide the produce into four equal parts, and he further directed as follows:—"one part or share to be equally divided between my daughter *Margaret Clemens* and her daughters, and the remaining part or share to be equally divided between my daughter *Jane Kelly* and her son *John*."

The testator died in 1853. The testator's daughter *Margaret Clemens* died in 1853, in the lifetime of the testator, without lawful issue. She had not, at the date of the will or at any other time, any legitimate daughter: but at the date of the will she had an illegitimate daughter *Dorothea Dennen*.

The testator's daughter *Jane Kelly* had, at the date of the testator's will, an illegitimate son *John Feenys*, but she never had any other son named *John*.

Doubts arose as to the true construction and effect of the will, *Dorothea Dennen* claiming one-half of one-fourth.

Mr. *Cole*, for the Plaintiff.

Mr. *H. Stevens*, contrà. Mrs. *Dennen* is entitled to a moiety of a share, for though illegitimate, she had acquired, at the date of the will, the reputation of being a daughter of Mrs. *Clemens*. Here it is clear, that, in the case

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case of Mrs. *Kelly*, the testator treated an illegitimate son as a son, and the presumption is, that he acted similarly in the case of Mrs. *Clemons*' daughter. This principle was acted upon by the Vice-Chancellor of *England* in *James* v. *Smith* (*a*), in which he held, that where a testator described persons mentioned in his will as nieces who were really his great nieces, all his great nephews and great nieces would take under a residuary gift to "all and every my nephews and nieces."

Mr. *E. Macnaghten*, for the heir, was not heard.

The MASTER *of the* ROLLS.

This case is perfectly clear. The gift is to "daughters" as a class, and daughters *primâ facie* mean legitimate daughters. Mrs. *Kelly* was living and might have had legitimate daughters, and it is clear that they alone would take. There is nothing to shew that reputed children were to take. If *Dorothea* had been mentioned by name in the same way as *John*, she would have taken; but I draw an opposite conclusion from the circumstance, that in one case the testator has given an interest to an illegitimate son by name, for if he did so in one case, why did he not do so in the other? He intended that all the daughters of *Margaret* should take, and that means legitimate daughters.

I am of opinion, that *Dorothea Dewson* cannot take any portion of the fund.

(*a*) 14 *Sim.* 214.

1858.

YARDLEY *v.* YARDLEY.

July 9.

Bequest to the children of a deceased niece who should be living at the testator's death, followed by a bequest to a nephew for life, and, after his decease, upon the like "trusts" for the benefit of his issue, and subject to the same powers, "limitations," &c. in respect to his issue, as those expressed as to the niece's children. The nephew had no child living at the testator's death, but he afterwards had one child born. *Held*, that such child was entitled to the second legacy.

THE testator bequeathed 3,000*l.* to trustees, in trust to pay the interest to his sister *Sarah Court*, and after her decease, to "pay and apply the same unto and among all and every the child and children begotten of the body of her late daughter *Elizabeth Houghton*, deceased, who should be living at the time of his decease, equally."

There was a substituted gift to the issue of any dying under twenty-one in the life of *Sarah Court*, and survivorship and maintenance clauses.

He gave his residue to the same trustees, upon trust to pay the income of one-third to his nephew *Thomas W. Yardley* for life, and, after his decease, "upon the like trust for the benefit of the issue of his nephew *Thomas W. Yardley*, and payable at the like times, having regard to the preceding life estate or interest, and with the like benefit of survivorship and accruer among such issue, and subject to the like powers, provisoes, declarations and limitations, with respect to such issue and the third part or share of such residue, as were hereinbefore expressed and declared of and concerning the first-mentioned sum of 3,000*l.* thereby bequeathed, in trust for his sister Sarah Court and the issue of her late daughter Elizabeth Houghton, with respect to the issue of the said Elizabeth Houghton."

At the date of the will, Thomas W. Yardley had no children.

The

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The testator died in 1826, and the Plaintiff *Anne Yardley* (who was the only child of *Thomas W. Yardley*) was born in 1839. *Thomas W. Yardley* died in 1840.

The question raised by the special case was, whether the Plaintiff, who was not living at the time of the testator's death, took any interest in the residue.

Mr. *L. Field*, for the Plaintiff, argued that there was a gift to the children of *Thomas W. Yardley* generally, without reference to their surviving the testator, and that the reference to the trusts in favor of the children of a deceased person, who were then ascertained, could not apply to the issue of a living person, who were unascertained and might be constantly varying.

Mr. *Bedwell, contrà.* The issue of *Thomas Yardley* are to take upon the "like trusts" and subject to the like "limitations" as the children of *Elizabeth Houghton*. Those only therefore could take who were living at the death of the testator, and the Plaintiff is therefore excluded.

The MASTER *of the* ROLLS.

The construction rests on these words: "Upon the like trusts for the benefit of the issue" of the nephew &c., such issue taking upon trusts corresponding with those expressed as to the children of *Elizabeth Houghton* so far as they were applicable. But there was this great distinction between the two classes of issue: *Elizabeth Houghton* was dead at the date of the will, and all her children were therefore ascertained, whereas the nephew *Thomas Yardley* was living and had no issue. The testator therefore gave special direction that the first class should

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should be ascertained and take vested interests on surviving him; but when he comes to give one-third of his residue to the issue of *Thomas Yardley*, though he gives it "upon the like trusts," I think the words "like trusts" refer to the mode in which the issue are to take, and were not intended to cut down the class. He expressly directs it to be payable at the like times, having regard to the preceding life estate, with the like benefit of survivorship and accruer.

I see nothing to shew that the issue of *Thomas* which are to take are to be the same as the issue of *Elizabeth*. It is "for the benefit of the issue" of *Thomas* generally, but the trusts, powers and limitations subject to which they are to take are to be analogous to those before expressed respecting the children of *Elizabeth*.

I am of opinion that all the children of *Thomas* took vested interests in the fund, which are subject to all the powers and all the limitations over by way of substitution and survivorship which are expressed as to the shares of the children of Mrs. *Houghton*, so far as they are applicable under the different state of circumstances.

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BYNE *v.* BLACKBURN.

July 27, 31.

A testator bequeathed a sum to trustees for his daughter for life, and afterwards to pay the dividends to her husband, "during his life, nevertheless to be by him applied for or towards the maintenance, education or benefit" of the daughter's children. There was a gift to the children after the decease of the survivor of the daughter and her husband. *Held*, that the husband took for life beneficially.

THE testator gave a sum of 15,000*l.* to trustees, in trust to invest, and stand possessed of one-third of it in trust, during the life of his daughter *Margaret* (who was then unmarried) to pay the dividends thereof to her for her separate use, without power of anticipation. And from and after her decease, in trust to pay to or otherwise to authorize or permit and suffer the husband of his daughter *Margaret* to receive the dividends, interest and yearly proceeds *during his life, nevertheless to be by him applied for or towards the maintenance, education or benefit of the child or children of his* (*the testator's*) *daughter Margaret.* And from and after the decease of the survivor of his daughter and her husband, the third part of the said money, &c. should be in trust for all the children of his daughter in equal shares; the shares of children as should be under twenty-one at the decease of the survivor of his daughter and her husband to be paid, as and when they respectively should attain that age, and the shares of such children as should attain the age of twenty-one years during the lives of his daughter and her husband, or during the life of the survivor of them, to be considered as vested interests in him, her or them respectively, as and when he, she or they respectively should attain that age, but to be paid at the end of six calendar months next after the decease of the survivor of her and her said husband, with the interest attending the same from the time of the decease of such survivor until the actual payment thereof.

The testator died in 1813, and in 1818 his daughter *Margaret*

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Margaret married the Petitioner, Mr. *Byne*, who, in 1826, took the benefit of the insolvent act.

Margaret Byne died in 1857. There had been six children of the marriage, four of whom had attained twenty-one and two died infants. Mr. *Byne* was administrator of his two children, who had attained twenty-one and died.

The fund being in Court, Mr. *Byne* presented a petition, submitting, that, under the circumstances, he was entitled (subject to the claim of the provisional assignee of insolvent debtors thereto) to the dividends of one moiety of the fund for his life, and also entitled to other moiety of the fund (as administrator), subject only to the claim of the provisional assignee to the dividends to accrue thereon during the Petitioner's life. He stated, that at the time of the decease of his wife his life interest in the fund was of the value of 1,474*l.*

The petition prayed, that out of one moiety of the fund, 1,474*l.*, the value of the Petitioner's life interest, might be paid to the assignee, and the remainder to the Plaintiff. And that the dividends on the other moiety might be paid to the Petitioner for life, or until further order.

Mr. *Selwyn* and Mr. *Williamson*, for the Petitioner, argued that the Petitioner was entitled to the income beneficially. They cited *Hammond* v. *Neame* (*a*).

Mr. *Willett* and Mr. *Osborne*, for Mr. *Stargis*, the assignee of the Petitioner, supported the petition, and they argued, that the children took no beneficial interest

(*a*) 1 Sheanst. 35.

terest until six months after the death of the survivor of their parents, "with the interest attending the same from the time of the decease of the survivor." Secondly, that if any trust existed in favor of the children, it ceased on their attaining twenty-one. They cited *Raikes* v. *Ward* (*a*); *Crockett* v. *Crockett* (*b*); *Woods* v. *Woods* (*c*); *Pride* v. *Fooks* (*d*); *Gardner* v. *Barber* (*e*); *Brown* v. *Casamajor* (*f*); *Andrews* v. *Partington* (*g*); *Browne* v. *Paull* (*h*); *Thorp* v. *Owen* (*i*).

Mr. *Lloyd*, for the children, argued that the father took the income, subject to a positive distinct obligation to apply it for the maintenance, education and benefit of the daughters' children; and that this was a trust which the Court would see duly performed and would enforce. They cited *Cooper* v. *Thornton* (*k*); *Wetherell* v. *Wilson* (*l*); *Kilvington* v. *Gray* (*m*); *Raikes* v. *Ward* (*n*).

The MASTER *of the* ROLLS.

I have had occasion to consider these cases, of which *Hammond* v. *Neame* (*o*) was the first. They may be divided into two classes; first, those where property is given to a parent directly, as a trustee, for his children; and secondly, those where the gift to the parent is coupled with a direction that he shall perform certain parental duties, which are legal obligations as regards a father, but are merely moral obligations in the case of a mother. It is, however, very difficult, as was observed by

(*a*) 1 *Hare*. 445.
(*b*) 2 *Phillips*, 555.
(*c*) 1 *Myl. & Cr*. 401.
(*d*) 2 *Beav*. 430.
(*e*) 18 *Jur*. 508.
(*f*) 4 *Ves*. 498.
(*g*) 2 *Cox*, 223.
(*h*) 1 *Sim*. (*N.S.*) 92.
(*i*) 2 *Hare*, 607.
(*k*) 3 *Bro. C. C*. 96.
(*l*) 1 *Keen*, 80.
(*m*) 2 *Sim. & St*. 396.
(*n*) 1 *Hare*, 445.
(*o*) 1 *Swanst*. 35.

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by Lord *Cottenham* in *Crockett* v. *Crockett* (*a*), to determine the precise interest which the children take in the latter cases. The case is stronger in the case of a father than in that of a mother, for it was well observed by Vice-Chancellor *Wigram*, that when you give a fund in aid of the performance of a duty which the donee is already legally bound to perform, it is a gift to and a beneficial interest in the person to whom it is made.

In this case, the testator himself appointed trustees of the fund, and he therefore could not have intended the father to act as a sub-trustee, and if he intended the children to have a direct and positive interest in the fund during the life of their father, he would have directed his own trustees to make the payment to the children. But he positively directs the payment to be made to the father, who might, therefore, give valid receipts for the amount, and the trustees would have been completely exonerated from seeing to its application. It is a gift to the father, "to be by him applied for or towards the maintenance, education or benefit" of the children, and the observations which I have made shew, that I think that this was a beneficial gift to the father to assist him in the performance of his parental duties, and that he was to be the judge how to perform it. He had such a discretion as the Court could not control, and subject to that obligation, which lies between him and his own conscience, I think he has a beneficial gift.

I must make the order asked.

(*a*) 2 *Phillips*, 553.

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GEDYE *v.* THE DUKE OF MONTROSE.

March 6.

Agreement for the sale of a lease, "with possession on the 1st of *December*, the rent to commence at *Christmas*." Possession was not given until the 31st of *January*, through the default of the vendor. *Held*, that the purchaser was entitled to compensation, and an inquiry was directed.

THIS was a suit instituted by a purchaser against the vendor for specific performance.

On the 12th of *November*, 1856, an agreement was, after some correspondence, entered into between the Plaintiff and Defendant, which was in the following terms:—

"It is agreed between the undersigned, that an assignment of the lease of *Little Marble Hill* premises and land at *Twickenham*, bearing date *September* 29th, 1844, at the rental of 160*l.* per annum, and to pay a premium of 160*l.*, *with possession on the* 1*st of December*. The rent to commence from *Christmas* next, the plants and furniture to be taken in the usual manner, by valuation at auction prices (Mr. *Gedye* not to be compelled to take plants exceeding in amount 20*l.*), to be settled in the usual manner.

"Dated 12th *November*, 1855.

"*Smith* and *Chapman*
(agents for the Duke of *Montrose*).

"*Nicholas Gedye.*"

Possession was not given, as intended, on the 1st of *December*, the Plaintiff having been requested by the Defendant to waive delivery of possession for a day or two, in consequence of the illness of one of his family.

No inventory was delivered by the Defendant until the 9th of *December*, the Plaintiff pressed for possession, and

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and a correspondence ensued. The valuation was completed on the 1st of *January*, 1857, when the Plaintiff sent a draft assignment, and required possession and compensation. The draft was approved of on the same day, and on the 2nd of *January* the assignment forwarded by the Plaintiff for execution.

On the 6th of *January*, 1857, some of the Plaintiff's family went down, and partially occupied the house, but the Defendant's servants, who had orders not to give possession, remained in the house. The matter was not completed, disputes arose as to the plants, and the Defendant's agents threatened to treat the Plaintiff as a trespasser, and the Plaintiff offered to deposit the purchase-money in the joint names of vendor and purchaser. On the 17th of *January*, the Defendant's agents denied all right of the Plaintiff to compensation; they insisted "that the possession was dependent on the completion of the purchase," and on the 20th, threatened "to take (and without further notice) summary proceedings against the Plaintiff as a trespasser."

The Plaintiff filed this bill on the 27th of *January*, 1857, for specific performance, for compensation, and for an injunction.

Upon a motion made in the cause, on the 31st of *January*, 1857, an order was arranged, by which the purchase was substantially completed and the Plaintiff was let into exclusive possession.

The Defendant had however previously taken very offensive means to molest the Plaintiff in his partial occupation of the premises, and the Plaintiff brought an action at law against the Defendant for trespass on the premises, for damage for non-delivery of possession

session according to the agreement and for non-completion of the contract.

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By an order in this suit, made on the 17th *April*, 1857, the Plaintiff was ordered to elect, and he elected to proceed in this Court, and an injunction issued to stay the action.

The cause now came on for hearing.

Mr. *R. P. Collier*, Mr. *J. H. Palmer* and Mr. *Welford*, for the Plaintiff.

Mr. *R. Palmer* and Mr. *Burdon*, for the Defendant.

Acland v. *Gaisford* (*a*); *Nokes* v. *Lord Kilmorey* (*b*); *Pordage* v. *Cole* (*c*) were cited.

The MASTER *of the* ROLLS.

My opinion upon the contract is, that it was of the essence of the contract that possession should be given on the 1st of *December*: that which was contracted and agreed between the parties was not, possession "from the 1st of *December*" or "as from the 1st of *December*," but "possession on the 1st of *December*." That it would be so at law there can be no question, and it is proved by the evidence, that possession was a matter of great importance to the Plaintiff, who expressly contracted for "possession on the 1st of *December*," that is, that possession should be given to him on that very day. All through the correspondence, the Plaintiff insisted from the commencement that this was the construction

(*a*) 2 *Madd.* 28.
(*b*) 1 *De Gex & Sm.* 444.
(*c*) *Saund.* 320 *b.*

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construction to be put on the contract; that was the view taken of it by the advisers of the Defendant, for at the end of *November*, the Plaintiff was applied to by the agents of his Grace to ask him to waive possession for a day or two on account of the indisposition of one of the ladies of his Grace's family. The Plaintiff assented and no attempt was made to say that possession was to depend on the previous valuation of the plants and furniture, and payment of the amount due. It was not until the letter of the 13th of *January* that that question was raised. There is a letter in which the Plaintiff's construction put on the contract is expressly disputed, but that is not till some time in the month of *January*. Mr. *Burdon* argues, that this cannot be the proper construction, because no one in his senses would enter into a contract to give possession until the payment was made. Now nothing is more common than to find contracts of that description, and persons must judge for themselves, as to the wisdom or folly of entering into them. This was certain, that if the contract was entered into on the 12th of *November* it would have been very possible to have had the inventory and valuation made before the 1st of *December*; there were eighteen or nineteen days in which that might have been done, and accordingly when the inventory was begun to be made on the 3rd of *December* it was completed forthwith.

My opinion therefore is, upon the construction of the contract, that possession was to be given on the 1st of *December*, that such was the view with which the Plaintiff entered into the contract, that he has always insisted on that view, and that it was never directly disputed by the Defendant until some time in the month of *January*. The inventory is settled, the valuation is made,

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made, the amount of the purchase-money is known and on the 1st of *January* the whole amount payable by the Plaintiff is ascertained. The Plaintiff sends a letter and the engrossment for examination and execution, but he requires compensation. On the 2nd of *January* the Plaintiff requests his Grace's agent "will name the earliest hour for completion," and then he goes on—"Be so good as to instruct the agents to give me possession, for my goods have been packed days for sending down;" he then states "the question of compensation can be adjusted, I have no doubt, satisfactorily afterwards." I think the effect of that letter is not in the slightest degree varied by the conversation sworn to have taken place with the clerk of his Grace's solicitors. I make a distinction in this case between the agents and solicitors. Here the solicitors seem only to have done what the agents directed. It appears from the letter of the 16th of *January* that the Plaintiff was willing to deposit the money in the bank in the joint names of his Grace and himself, and in point of fact he makes there a direct offer to have the matter settled at once.

That being the state of the case, in my opinion the contract has been specifically performed, under the order made on the 31st of *January;* the suit has been occasioned by the conduct of the agents of his Grace, who must be liable for the acts of his agents, however much he would naturally have disapproved of them. The costs of this suit must follow the decree I am about to make other than the costs which relate to the repairs, in respect of which the Plaintiff in my opinion entirely fails, and in respect of which he must pay the costs.

I am of opinion that the time of giving possession being of the essence of the contract and the Plaintiff,

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being entitled to possession on the 1st of *December*, is entitled to have it ascertained by this Court what, if any, loss or damage has been sustained by him, by reason of possession not having been given to him until the 31st of *January*, and the decree which I propose to make will be something in this form:—The agreement having been specifically performed under order of this Court of the 31st of *January*, 1856, by the parties themselves (reciting that in the order), and this Court being of opinion, that according to the true construction of the agreement, possession was agreed to be given on the 1st of *December*, 1856, refer it to chambers to ascertain what loss or damage has been sustained by the Plaintiff by reason of such possession not having been given till the 31st of *January*, 1857. The Defendant must pay the Plaintiff his costs of the suit up to and including the hearing, other than the costs occasioned by the evidence respecting the repairs of the premises at *Little Marble Hill*, the costs of which are to be paid by the Defendant to the Plaintiff. I only include the costs of the evidence, because I find this question of repairs added by an amendment of less than a dozen lines and the other was the substantive part of the question.

DECREE.

The Court, "being of opinion that possession was agreed to be given on the 1st day of *December*, 1856, doth order, that an inquiry be made what loss has been sustained by the Plaintiff in consequence of possession not having been given until the 31st day of *January*, 1857."

The Defendant to pay the costs up to the hearing.

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LINDSAY *v.* GIBBS. (No. 2.)

June 2, 9.
July 1, 2.

A. and *B.* were co-owners of a ship, which had been chartered for a voyage. *A.* assigned his share of the freight to *C.*, who gave no notice of it to *B.*, and both the ship and freight were afterwards insured by the ship broker, according to the ordinary course of dealing between *A.* and *B.* *Held*, that *C.* must bear his share of the wages of the crew, and the expenses of the insurance of the ship and freight.

THIS case came on upon a motion to vary the Chief Clerk's certificate.

In 1854, Mr. *Hammond* was the registered owner of a ship called the "*Genghis Khan*."

Mr. *Hammond*, the owner, by a charter-party, dated the 27th day of *April*, 1854, chartered a ship, called the "*Genghis Khan*," to the Defendants Messrs. *Gibbs* & Sons, for a voyage to *Moreton Bay*, *Australia*, and then to proceed to *Peru*, and load and bring to this country a cargo of guano, at certain rates of freight therein mentioned.

Mr. *Hammond*, on the 29th of *December*, 1854, in order to secure some moneys due to the Plaintiffs Messrs. *Lindsay*, signed and delivered to the Plaintiffs a letter dated the 29th day of *December*, 1854, addressed to Messrs. *Gibbs* & Sons, which was as follows:—

"29th *December*, 1854.

"To Messrs. *Gibbs* & Sons.

"Gentlemen,—We hereby assign to Messrs. *W. S. Lindsay* & Co., of 8, *Austin Friars*, the freight which will become due from you to us on the delivery of the cargo shipped by your house abroad in the ship "*Genghis Khan*," in the month of *November* last, to the extent of 4,300*l.* sterling, and we therefore request you to hold this amount at their disposal, whose receipt for the same shall be binding upon us."

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The Plaintiffs, on the date of the letter, communicated it to Messrs. *Gibbs* & Sons, and produced the original to the firm.

The ship arrived in the port of *London* in *June*, 1855, and the Plaintiffs then claimed the freight. It then appeared, that on the 1st of *June*, 1854, Mr. *Hammond* had executed bills of sale of twenty-four sixty-fourths as of the ship to Messrs. *Briggs*, which were registered in *September* and *November*, 1854; and that in *June*, 1854, Mr. *Hammond* had altogether transferred the remaining forty sixty-fourths to *Cripps* and ten others, but the transfer was not registered until between the 5th and 26th of *January*, 1855.

At the hearing (*a*) it was held, that the Plaintiffs' right to forty sixty-fourths of the freight had priority over Messrs. *Cripps* and the other ten claimants of the forty sixty-fourths of the ship. By the decree, it was declared, that Messrs. *Briggs* were entitled to twenty-four sixty-fourths of the freight, and the Plaintiffs to the remaining forty sixty-fourths, and the following accounts were directed:—

1. An account of the freight earned by the ship, under the charter-party, from the 27th day of *April*, 1854, the date of the charter-party.

2. An account of all charges and expenses properly incurred, by and on behalf of the ship and of her voyage, in earning the freight under the charter-party; and in taking the accounts, all just allowances were to be made, and all parties were to have credit for sums paid by them, and to be charged with sums received by them respectively.

(*a*) 22 *Beav.* 522.

respectively. And it was declared, that the earnings of the ship were liable, in the first place, to make good and repay what should be found due in taking such accounts, and that the surplus was divisible in twenty-four sixty-fourths to the Defendants *Briggs* & Co., and forty sixty-fourths to the Plaintiffs.

The Chief Clerk certified, that the freight earned amounted to 5,813*l.* 13*s.* 5*d.*, and that the charges and expenses properly incurred, by and on behalf of the ship and of her voyage, in earning the freight under the charter-party, amounted to the sum of 3,822*l.* 9*s.* 11*d.* The following were some of the items of charges and expenses as set out in the schedule.

1855.		£ s. d.
January 23	To Insurance on Freight, *Callao*, &c., to the *United Kingdom*, 2,000*l.* at 7 guineas, and policy	151 4 0
,, 30	,, *Alliance* Insurance Company	4 0 0
February 9	,, Insurance on Ship, *Callao*, &c., to the *United Kingdom*, 6,000*l.* at 10 guineas, and ditto, due 8th *February*, 1857	717 11 6
	,, 6,000*l.* at 8 guineas, and policy	518 12 6
,, 12	,, Ditto Freight, 1,000*l.* at 10 ditto	107 2 0
	,, Ditto, ditto, 3,950*l.* at 9 ditto	381 13 6
	&c. &c. &c.	&c. &c. &c.
	,, Captain's wages	222 5 6
	,, Mate and Seamen's wages, exclusive of Captain	1,412 9 7
	Total.....	£3,822 9 11

The payments for the insurance had been *bonâ fide* made

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made by the ship broker in the usual course of business as ordinarily conducted between *Hammond* and his co-owners Messrs. *Briggs*, and at the time of the insurance neither the brokers nor Messrs. *Briggs* had received any notice of the Plaintiffs' right to the freight.

Hammond had become bankrupt.

A motion was made by the Plaintiffs to vary the certificate.

Mr. *Selwyn* and Mr. *Hetherington*, in support of the motion.

The Plaintiffs have no interest in the ship, and therefore they ought not to be charged with the expense of insuring it. They were owners of a portion of the freight, but no one had any right to insure it without their express authority; even a ship's husband is not allowed the expenses of insuring a ship without the direct authority of the part owners. It was surely optional with the Plaintiffs, whether they would be their own insurers or not. There are insurances effected to the extent of 18,950*l.*, while the Plaintiffs' interest is only 4,300*l.*

As to the payments to the crew, it is like deducting servants' wages from the rent of a house. The wages are a charge on the ship, and not on the freight; *French* v. *Backhouse* (*a*); *Abbott on Shipping* (*b*).

The Master *of the* Rolls: Mr. *Palmer*, all that I want to hear you upon is the question of insurance. I am not quite sure how that matter stands. With respect

(*a*) 5 *Burr.* 2727. (*b*) *Page* 85.

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spect to the wages, I entertain no doubt that they are properly payable out of the freight, before any portion of the freight (which means the net produce) can be divided, and I find that was what I stated in my judgment at the hearing of the cause, so that, with respect to that, there can be no question in this stage of the cause. But I am not quite so clear about the insurance.

Mr. *R. Palmer* and Mr. *Cole*, for Messrs. *Briggs*.

Where a ship belonging to several part-owners is chartered, there is a species of partnership, and all common and reasonable expenses must be paid before the division of profits. Here it is proved by Mr. *Anderson*, that all the co-owners of the ship authorized the insurance in writing, and it was done before any notice of the Plaintiffs' title to the freight. The owners agreed as to the mode of conducting the adventure, and the assignees of the freight are bound by it. It is like the right of set-off, which remains until notice; *Cavendish* v. *Geaves* (*a*). Freight is not assignable at law, and therefore the co-owners of the ship were not affected until notice, which was not given to Messrs. *Briggs* until the filing of the bill. Notice to the charterers is immaterial. They cited *Cato* v. *Irving* (*b*); *Abbott on Shipping* (*c*); *Green* v. *Briggs* (*d*).

Mr. *Baggallay*, for Messrs. *Cripps*, the owners of the forty sixty-fourths of the ship.

Mr. *Hetherington* in reply. *Hammond* had notice of the Plaintiffs' rights, this was constructive notice to all his co-partners. If the ship had been lost, the Plaintiffs

(*a*) 24 *Beav.* 163.
(*b*) 5 *De Gex & S.* 210.
(*c*) *Page* 73 (10*th edit.*).
(*d*) 6 *Hare*, 395.

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tiffs could not have recovered on the policies, nor could the assured have recovered more than the amount of their personal loss, which would not have covered the interest of the Plaintiffs.

The MASTER *of the* ROLLS.

July 2. After some hesitation upon this point, which I have considered more fully since the Court rose yesterday, I am of opinion that the certificate is correct.

The question of wages I disposed of yesterday, and the only point on which I entertained a doubt was upon the question of the insurance of the ship, with which it appeared to me the persons who were entitled to the freight had nothing to do; but upon further considering the question, I am of opinion that the insurance of the ship (which, as was very properly observed, is an insurance against the loss of the ship on that particular voyage) must be treated as part of the expenses of the voyage itself. In truth, it is as much part of the expenses of the voyage as the insurance upon the freight or any other matter relating to it, and the persons who are entitled to divide the profits of the voyage amongst them are entitled only to the profit after paying the expenses.

My attention was called to that class of cases, in which it is very justly said, that one person cannot insure the share of another person, but I think, upon the evidence, that the owners of the ship here had an authority to make the insurance which they thought proper and necessary, and this is to be implied from the course of dealing between them upon all the occasions that occurred, and consequently, if there had been no

no assignment of the freight, Mr. *Hammond*, the assignor himself, could not have resisted payment of the insurance of the ship or of the freight; it was not open to him afterwards to say that his partners and co-owners of the ship had not authority both to insure the freight and the ship. If that be so, I am of opinion that the assignee of the forty sixty-fourths of the freight must be in exactly the same situation, unless he gave direct and personal notice to the co-owners that an assignment had taken place; I do not think this is a question on which anything can be founded upon any principle of implied or constructive notice. I am of opinion then that all persons claiming under Mr. *Hammond* were bound, unless they gave distinct and specific notice to the co-proprietors of the ship, that they had an interest distinct from Mr. *Hammond* in the matter, in which case it would probably have been necessary to have obtained their authority to any steps to be taken in order to bind them.

I also find that this was the view which I took at the hearing of the cause, as appears at the concluding words of my judgment, and which is confirmed by my note of what took place. Although the point, I am bound to say, did not come before me in the same specific form that it does now, my decree was, that the freight was to be divided after deducting the expenses of the voyage, and therefore if I am of opinion that this is properly one of the expenses of the voyage, then I think that it follows that the freight must be divided after deducting the expenses of the insurance.

NOTE.—The decisions of the Master of the Rolls in the former and present occasion were affirmed by the Lords Justices on the 1st of *March*, 1859.

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HARTSHORNE *v.* NICHOLSON.

July 9, 10.

A bequest of money to "establish a school for educating the poor children" of a parish is not void under the Statute of Mortmain.

A testator bequeathed, first, to the minister of *M.* a sum of [*blank*] for educating the poor; secondly, an annuity of 5*l.* a year to *A.* for life, and after her death, to the minister of *M.*, in addition to the sum of [*blank*] for educating the poor of *M.*; and, thirdly, an annuity of 15*l.* to *B.* for life, and after his decease he gave to the minister of *M.* the said sum of [*blank*] in addition to the two sums before mentioned. *Held*, that the corpus producing the annuity was well given to the charity, subject to the life interests.

JOSHUA WILLIAMS, by his will dated the 6th of *April*, 1819, expressed himself in the following terms:—

"I give and bequeath to the minister and churchwardens of *Minsterley*, in the parish of *Westbury*, the interest of for ever, *to establish a school for educating the poor children of the aforesaid parish of all denominations and to provide a schoolmaster*, who must be of a good moral character, and to remain as schoolmaster as long as he shall behave himself well in the aforesaid office, or during their, the aforesaid minister and churchwardens', pleasure."

I give and bequeath to *Hannah Gough* an annuity of 5*l.* a year, to be paid to her half-yearly during her natural life; and, after her decease, "I give and bequeath to the minister and churchwardens of *Minsterley* aforesaid the said sum of 5*l.* a year for ever, in addition to the before-mentioned sum of a year, for educating the poor children of the parish aforesaid."

"I give and bequeath to my good friend *John Johnson*, &c., an annuity of 15*l.* a year during his natural life for the trouble he may be at in managing my affairs; after his decease, then it is my will I give and bequeath to the minister and churchwardens of *Minsterley*, in the said parish of *Westbury*, in the county aforesaid, the said sum of a year in addition to the two sums before mentioned."

The

The testator died in 1820, and his executors *John Johnson* and *Richard Whiteaves* invested part of his estate in the purchase of 666*l.* 13*s.* 4*d.* £3 per Cent. Consols, to meet the two annuities of 5*l.* and 15*l.*

The annuitants *Hannah Gough* and *John Johnson* were both dead.

The Plaintiff was the present personal representative and one of the next of kin of the testator. The Defendants *Nicholson* and *Everall* were the minister and chapelwarden of *Minsterley*, and the Defendant *Guy* was the representative of *Johnson*.

The Plaintiff stated, that she was advised that, having regard to the terms of the testator's will, and to the blanks therein left, and also having regard to the laws relating to charitable uses and gifts, the bequest to the minister and churchwardens of *Minsterley* was invalid, and that the Plaintiff and the other next of kin of the testator living at his death were entitled thereto, as part of the residuary estate of the said *Joshua Williams*.

The bill prayed a declaration that the bequest to the minister and churchwardens of *Minsterley* was invalid, and that the sum of 666*l.* 13*s.* 4*d.* £3 per Cent. Consolidated Bank Annuities, and the dividends accrued thereon since the death of the said *John Johnson* and *Hannah Gough* respectively, belonged to and formed part of the residuary estate and effects of the testator.

Mr. *R. Palmer* and Mr. *J. H. Palmer* for the Plaintiff.

Mr. *Murray* for *Guy*.

Mr.

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Mr. *Tripp* for *Parry*.

Mr. *H. Murray* for other Defendants.

Mr. *Wickens* for the *Attorney-General*.

The MASTER *of the* ROLLS.

July 10. The first gift is clearly void, for it is a gift of nothing, but its validity as a charitable bequest, assuming a sum to have been stated in the place of the blank, becomes material in reference to the third bequest.

I have already expressed my opinion that I entertain no doubt whatever of the validity of the second bequest for educating the poor of the parish.

When I first read the third bequest, I conceived that there being a blank as to the sum, it was open to the same objection as the first, and that the same ingredient would make it void, but it was called to my attention, that it is clear that the testator intended to give the 15*l.* a year, which he had previously given to *John Johnson* for life, and I think that no answer can be given to that argument.

The question then arises, by coupling the two bequests together, as to the validity of this gift of 15*l.* per annum to the minister and churchwardens of the parish of *Minsterley* for the purposes before mentioned. As to the first bequest, therefore, it becomes necessary to consider the validity of its terms as a charitable gift. The third bequest must be read in the same manner as if the words of the first had been introduced into it, and as if the testator had said this:—"After the death of *John Johnson*, I give the said sum of a year for ever in addition

addition to the two sums of 5*l.* and 15*l.* before mentioned to establish a school for educating the poor children of the aforesaid parish of all denominations, and to provide a schoolmaster."

I am of opinion that this would be a good bequest. In the first place, assuming it to be established by the authorities which I commented on in *Trye* v. *The Corporation of Gloucester* (*a*), that every bequest which contemplates the putting of land into mortmain is void under the statute, and that it has been decided, by a number of authorities, that if a person give a sum of money to erect a school-house, it will involve the purchase of land, and therefore that such a gift is void under the statute, still that does not dispose of the question here, which is, whether a gift of money to establish a school necessarily involves the purchase of land or the building a school-house. I am of opinion that a school may be established by hiring a room, without necessarily involving the purchase of land; and it is not for me to declare that a gift is void, because one of the many modes by which it might be carried into effect would involve the purchase of land.

I will only refer to three authorities on the subject. In *Johnston* v. *Swann* (*b*), the marginal note, which is accurate, is this:—"A bequest of 7,100*l.* to be laid out in the funds, and the interest and dividends to be applied in providing a proper school-house, held to be a good charitable bequest, as a school-house might be hired." Sir *John Leach* considered that to be a good charitable bequest. If so, that case goes much further than the present, because there the trustees were to "provide a proper school-house;" but here the gift is

(*a*) 14 *Beav.* 173. (*b*) 3 *Mad.* 457.

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is only "to establish a school." Sir *John Leach* says, "With respect to the school, the single question is, whether, to execute the express purpose of the testator, land must be purchased for erecting a school. The testator has directed only that a proper school-house should be provided, which may be by hire, and it is some evidence of his intent that land should not be bought, that the trustees are only to apply the dividends, and no part of the principal, to the expense of providing a school-house. It is said he meant the charity to continue for ever; but this intent may be executed without necessity for the purchase of land."

These observations are in every respect strictly applicable to the present case, and *Johnston* v. *Swann*, which has been frequently cited and commented on, has never, so far as I am aware, been doubted. It was explained by the Vice-Chancellor of *England* in *Giblett* v. *Hobson* (*a*), who says, "I must, first of all, mention that the authorities which I have stated are not, in my opinion, at all affected by what was decided by Sir *John Leach*, Vice-Chancellor, in the case of *Johnston* v. *Swann*; because, in that case, the testatrix had directed that the interest of so much only of the larger fund, which she directed to be applied for charitable purposes, as should not exceed 600*l*., should be applied for providing the school-house. It is perfectly obvious, therefore, that that direction never could be meant to be a direction to build, for there could only be an annual sum of 18*l*. applied. I mention that, because it does not appear from the printed report of the judgment that Sir *John Leach* took notice of that fact; but his Honor seems to suppose that the interest of the whole of the fund was applicable, and the marginal note so treats

(*a*) 5 *Sim*. 661.

treats it; whereas, in point of fact, it was only the interest of so much of the fund as should not exceed 600*l.* that was applicable to providing the school-house."

I cannot say that I am quite satisfied with the grounds upon which that observation rests. I do not see that the greater or the less amount of the dividends can make a bequest void or not under the Statute of Mortmain, and I rather prefer resting the decision on the ground on which Sir *John Leach* placed it. But if the ground of the Vice-Chancellor of *England* was a just one, and applicable at all, it is strictly applicable to the present case, where only 20*l.* a-year is to be applied for the purpose of establishing the school; it would be impossible to purchase land and erect a school-house with so small a sum, unless it was accumulated for a sufficient number of years, for which no direction is, or indeed could be, given in the will.

In *Philpott* v. *St. George's Hospital* (*a*) I thought the charitable gift void, because it manifestly contemplated, not directly but indirectly, the bringing of land into mortmain. My decision was reversed by the House of Lords, who differed from me in opinion, and held that the charitable gift was perfectly good (*b*).

I think these cases go much further than the present, and, consequently, that this is a valid gift to the charity, and I must accordingly so declare.

(*a*) 21 *Beav.* 134. (*b*) 6 *H. of L. Cas.* 338.

1858.

GULLAN *v.* GROVE.

July 12.

A. B. had a power to appoint "by his will or any writing in the nature of or purporting to be his will, or any codicil thereto." On his death, the third and fourth sheets of a will were alone discovered, and which were in the handwriting of and signed by *A. B.*, and were attested by two witnesses; one of them contained, in words, a perfect appointment. Probate having been refused, *held*, that this was not a valid execution of the power to appoint by writing "purporting to be a will."

THE testator gave and bequeathed all the residue of his estate and effects to his brother *Thomas Gullan* and two others, upon trust to sell and invest, and permit his brother *Thomas Gullan* to receive the interest for life, and after his decease, upon trust for his children, with remainders over.

His will contained a proviso, that if his brother *Thomas Gullan* should not have any child or children to take under the provisions of the will, then and in such case, the testator thereby authorized his brother *Thomas Gullan, by his will or any writing in the nature of or purporting to be his will, or any codicil thereto,* to give unto his wife an annuity of 100*l.* a year, for the term of her life, to commence from the day of his decease, or failure of issue to take as aforesaid (as the case might be), and the testator directed and required his trustees and executors to pay the same accordingly.

The testator died in 1841; his brother *Thomas Gullan* died in 1857, without ever having had any child, leaving the Plaintiff his widow.

Shortly after *Thomas Gullan's* death the Plaintiff and her sister found in the library or parlour of his house, in which he usually kept his deeds, securities and other valuables, a paper writing in two sheets, manifestly forming the third and fourth sheets of a will made by him, and relating (amongst other things) to the power or authority given him to give to his wife an

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an annuity of 100*l.* a year for her life. They were wholly in the handwriting of *Thomas Gullan*, with the exception of the names of the witnesses, and were as follows:—

"of Mr. *William Sopwith*, in trust to my executors for my dear wife *Lucy*. In my late brother's will, on pages seven and eight, I may leave 100*l.* to my dear wife *Lucy* during her life: it's my particular wish the said 100*l.* to be paid out of the rent of house in *Piccadilly*, now in the occupation of Mr. *James Clarke*, No. 225; should the said house in *Piccadilly* be unoccupied, then in the houses in *Store Street*. I also leave the six houses and small stable in *Southville* in the parish of *Lambeth*, in the county of *Surrey*; also bequeath twenty shares in the *Romford* Gas Company, in the county

"*Thomas Gullan.* "*Henry Poole.*
"*W. C. Poole.*"

"of *Essex*, also fifty shares in the *Guarantee* Society, *Birchin Lane, City*; also four shares in the *Guardian* Fire Office, *Lombard Street, City*. It's my particular wish and desire that the children of Mrs. *John King Eager* shall have the half part of *Bower's* Farm, after my dear wife's decease, when the youngest child attains the age twenty-one years. It's also my particular desire to be buried in *St. Margaret's* Churchyard, *Westminster*; should it not be allowed, then my remains to be entered in *Ripley* Churchyard, the other side of the remains of

"*Thomas Gullan.* "*Henry Poole.*
"*W. C. Poole.*"

The house in *Piccadilly* was part of the first testator's estate.

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Diligent search was made, but no other will or codicil could be found. His widow applied to the Court of Probate for probate of these testamentary documents, which was refused.

The widow then instituted this suit, praying a declaration that the above testamentary paper, signed by the testator and attested, was a good and valid execution of the power in her favor, and for consequential directions.

Mr. *Beales*, for the Plaintiff, contended that this was a valid execution of the power, being "a writing in the nature of and *purporting* to be his will." That it did not the less "purport" to be his will because it could not be proved in the Probate Court; and that this document, so far as related to the execution of the power, was complete in itself. He cited *Duke of Marlborough* v. *Lord Godolphin* (*a*).

The MASTER *of the* ROLLS: The question is, whether I can treat a part of an instrument as a writing purporting to be a will. If this had been the whole instrument, I should have had no doubt; but here he has cancelled half the instrument. I express no opinion as to whether a person can partially cancel his will; but it seems to me that the point now before the Court is exactly the same as that which was before the Court of Probate, viz. whether a part only of a will can be treated either as a will or as writing purporting to be a will.

Mr. *Follett* and Mr. *J. H. Taylor* then asked that the bill might be dismissed with costs, on the ground that the point was clear. They cited *Sugd. Powers* (*b*); and

(*a*) 2 *Vez.* sen. 61. (*b*) *Vol.* 1, *pp.* 156, 262, 296 (6*th edit.*)

and *Longford* v. *Eyre* (*a*), where the power was to be executed by will, "or by any writing in the nature of a will," and the Lord Chancellor thought that the words "in the nature of a will" meant the same as a will.

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The MASTER *of the* ROLLS.

The bill must be dismissed with costs.

(*a*) 1 *P. Wms.* 741.

ROWLAND *v.* TAWNEY.

July 27.

Bequest to a living person for life, and afterwards to his children, followed by a declaration that these interests should be considered a vested interest at the age of twenty-five, and a gift over to the issue of any dying under twenty-five: *Held*, too remote.

THE testator gave 4,000*l.* to his executors in trust for his nephew *James Whiteaves Rowland* for his life, "and after his decease, to divide the same amongst his children, and if he shall leave no issue, amongst the children of his brothers *John* and *Joseph*; and if they shall leave no issue, I direct the same to sink into and become part of the residue of my personal estate."

He gave the residue to his six nephews and nieces for life, as tenants in common, with power to appoint their shares to their children.

He then proceeded as follows:—"And it is my will that the legacy, share or pecuniary interest which any person (meaning thereby any of my said nephews and nieces, or their issue, limited to them) shall take, under this my will, *shall be considered as a vested interest at the age of twenty-five years*; and if any such person shall die before the same shall become so vested, then such legacy, share or pecuniary interest, as well original

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as accrued, shall go and accrue to the brothers or sisters, or brother or sister, of such person, in like manner as their original shares; but in case any such persons shall have left issue, then such issue shall have the share or shares, both original and accrued, to which their deceased parent or parents would have been entitled, such share or share to be vested and payable, at the like time and subject to the same contingencies, as directed concerning the share or shares of their parents.

" And also that all interest or other proceeds of personal estate, and also all rents and proceeds of freehold and leasehold estates (except where herein otherwise directed), shall be received by my executors, and accumulated and be invested, in manner aforesaid, for the benefit of the person or persons *presumptively* entitled to the enjoyment of such estates for life, in tail, or otherwise. Nevertheless, I give my executors full power to apply, for the maintenance, education or advancement in the world of such persons respectively, until they shall attain the age of twenty-five years, such part of the said interest or rents as my said executors shall think fit. And in particular, that in case any such person or persons, being a female or females, shall marry under the said age of twenty-five years, with the consent of my executors, then my executors shall be at liberty, if they think proper, to pay to such female or females the whole or any part of such interest or rents, or to settle any principal monies or estates, or any part thereof, to the separate use of the said female or females, or otherwise as my said trustees shall think proper, and at their sole discretion, so far as the same can be done consistently with the provisions of this my will, and the contingencies herein provided for "

The testator died in 1835, his nephew *James Whiteaves Rowland*

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Rowland died in 1857, without having been married. The 4,000*l*, which was in Court, was now claimed by the children of *John* and *Joseph Rowland*.

Mr. *Hadden* in support of the petition.

Mr. *Toller* and Mr. *Eddis*, for the children of *John* and *Joseph*, argued, first, that the vesting clause only affected the residue; and, secondly, that the meaning of vesting was "indefeasibly vested;" *Howgrave* v. *Cartier* (*a*); *Poole* v. *Bott* (*b*); *Taylor* v. *Frobisher* (*c*); *Berkeley* v. *Swinburne* (*d*).

Mr. *Lloyd*, Mr. *Drewry* and Mr. *Giffard*, for the widow's representatives and persons in the same interest, argued that the gift to the children at twenty-five was too remote and void; *Griffith* v. *Pownall* (*e*); *In re Morse's Settlement* (*f*); and that the contingency on which this fund was directed to fall into the residue not having happened, it was undisposed of.

Mr. *Follett* and Mr. *Torriano* for other parties.

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Although the Court has, always, every disposition to treat an interest as vested, still I cannot get over the words of this will.

The first gift, to *James Whiteaves Rowland* for his life and afterwards to his children, and, if he shall have no issue, amongst the children of his brothers *John* and *Joseph*,

(*a*) 3 *Ves. & B.* 79.
(*b*) 11 *Hare*, 33
(*c*) 5 *De Gex & Sm.* 191.
(*d*) 16 *Sim.* 275.
(*e*) 13 *Sim.* 393.
(*f*) 21 *Beav.* 174.

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Joseph, and if they shall have no issue then to fall into the residue, is perfectly good; and if the testator had given it over by a subsequent clause, "if they died under twenty-five," I should still have held it a vested interest to be divested on death under twenty-five and indefeasibly vested at twenty-five.

My difficulty arises from this express direction in the subsequent clause, that the shares of the nephews and nieces "shall be considered as a vested interest at the age of twenty-five years, and if any such person shall die before the same shall become so vested, then such legacy" &c. shall accrue to the "brother or sister of such person in like manner as their original shares." If it had stopped there, I should have been disposed to think that it meant indefeasibly vested at twenty-five, because it does not provide for the case of a person dying leaving issue.

But here the testator says, "in case any such person shall have left issue, then such issue shall have the share or shares, both original and accrued, to which their deceased parent or parents would have been entitled, such share or shares to be vested and payable at the like time and subject to the same contingencies as directed concerning the shares of their parents."

I think it impossible to get over those words. He provides for everything that is to occur, there is nothing to become vested until they attain twenty-five, and he attempts to give a vested interest to unborn issue at twenty-five, which he clearly cannot do.

If I found anything in the cases in anyway to control the construction of the will, I should be glad to adopt it.

Taylor

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Taylor v. *Frobisher* (*a*) does not apply to this case. He has drawn this will as if he had read that case, and excluded the very ground upon which the Vice-Chancellor decided it.

In *Berkeley* v. *Swinburne* (*b*), a good deal turned upon the clause for maintenance and advancement, it being given out of the share to which they were entitled. Here the testator merely gives to the executors a power of maintenance and advancement out of the income. When a daughter marries under twenty-five with consent, he gives his executors power to pay such daughter the whole or any part of such interest or rents, or to settle any principal moneys or estates, or any part thereof, to the separate use of such female, or otherwise as they shall think proper and at their sole discretion, "so far as the same can be done consistently with the provisions of this my will and the contingencies herein provided for." The testator, therefore, guards against and prevents it becoming vested. I see no mode by which I can get over the words.

Upon the other point I entertain no doubt: the bequest does not take effect, and it falls into the residue. The testator's saying, that it is to fall into the residue in a particular event, does not prevent its falling into the residue in another event, which he did not anticipate. Therefore, it must go and be divided as a share of the residue.

(*a*) 5 *De G. & Smale*, 191. (*b*) 16 *Sim.* 275.

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TOWNSHEND *v.* MOSTYN.

July 20, 22.

A testator gave a legacy of 7,000*l.* to his wife and other similar legacies. By a codicil, he gave a legacy of 6,000*l.* to his wife and other legacies, and he directed "that so far as the codicil was in addition to any testamentary document he had already made, he wished it to take effect, and not cancel or revoke any prior document which might exist. *Held*, that the legacies were cumulative.

An estate was subject to mortgages of 7,000*l.* created by the testator, and of 13,000*l.* created by his ancestor; but the testator had consolidated them into one mortgage for 20,000*l.*, which he had covenanted to pay. The testator directed his debts to be paid out of his personal estate, but if insufficient, he charged them on his real estate. He devised his real estates "subject nevertheless to the mortgages affecting the same." The testator died in 1840. *Held*, that the devisee of the estate did not take *cum onere*, but was entitled to have the whole mortgage debt paid out of the testator's personal estate.

THE testator *Henry Meredith Mostyn*, by his will dated the 24th of *March*, 1834, directed his debts, funeral and testamentary expenses to be paid out of his personal estate; but in case it should prove insufficient for that purpose, he directed that the same should be a charge on his real estate. He then gave to his wife *Susanna Mostyn* all his household goods, &c. &c. He then gave and devised all his real estate in the counties of *Denbigh* and *Merioneth* (subject nevertheless to the mortgages affecting the same) unto his wife for life, in case she should continue his widow and unmarried, and from and after her decease or marriage, then to his brother *Thomas Arthur Bertie Mostyn* for life, with remainder to his first and other sons in tail. And after reciting, that he had acquired a vested interest in divers sums of money, which would not become payable until after the decease of his mother, the testator gave and bequeathed the following sums out of the same to the persons hereinafter mentioned (that is to say), to his wife *Susanna Mostyn*, the sum of 7,000*l.*, to his brother-in-law *Charles Townshend*, the sum of 1,000*l.*, to his sister-in-law *Anne Townshend*, the sum of 1,000*l.*, and to his brother-in-law *John Townshend*, *George Townshend*, *Henry Dive Townshend*, the Reverend *Bennett Vere Townshend*, and to his sister-in-law *Dorothea Cunliffe*, 200*l.* each. And the

the testator directed that the several legacies should become a vested interest in each of the legatees within six calendar months after the decease of the testator's said mother. And the testator declared, that the bequests and provisions made in favor of his wife should be accepted in lieu of dower and thirds. And as to all the rest and residue of the testator's then present estate and effects, whatsoever and wheresoever, and of what nature or kind soever, not thereinbefore specifically disposed of, the testator bequeathed the same to his brother *Thomas Arthur Bertie Mostyn* absolutely; and he appointed his brother and *Townshend* executors.

The testator made a codicil dated the 29th of *July*, 1840, in the words following:—"In case I have not already disposed of my personal property, I give to my dear wife the sum of 6,000*l.*, to my relations *Anne Townshend* and *Charles Townshend* 1,000*l.* each, to *Harriette Dorothea* and *Marian Susan Townshend* 500*l.* each, to *John Townshend*, *Dorothea Cunliffe*, *Henry Dive Townshend*, *George Townshend* 300*l.* a piece, to the trustees of the new church at *Denbigh* 500*l.*, the above sums to be a charge on and paid out of a certain sum of money to which I am entitled on the death of my mother and immediately after her death. I give the residue of my personal effects to my dear brother *Bertie Mostyn*. So far as the above is an addition only to any testamentary document I may have already made, I wish this my will to take effect, and not to cancel or revoke any prior document which may at present exist."

The testator died in 1840. At the death of the testator *Henry Meredith Mostyn*, the debts secured on his real estates by mortgage consisted of 20,000*l.*, 3,500*l* and 1,000*l.*, of which 13,890*l.* 19*s.* (part of the first mortgage

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mortgage of 20,000*l.*) and the third mortgage of 1,000*l.* had originally been debts or incumbrances created by his father; but the testator had included the 13,899*l.* 19*s.* in the 20,000*l.*, and had become personally liable for the payment of the aggregate sum.

Two questions arose, first, whether the legacies given by the will and those by the codicil were cumulative; and, secondly, whether the devisees of the real estate took *cum onere*, or whether the mortgages were payable, in the first instance, out of the personal estate.

Mr. *R. Palmer* and Mr. *Lindley*, for the Plaintiff.

Mr. *Greene* and Mr. *Boyce*, for the testator's brother.

It was argued, first, that the legacies were substitutional and not cumulative; *Lee* v. *Pain* (*a*). Secondly, that the debts were payable out of the personal estate, but if that were insufficient, then out of the real estate; *Bateman* v. *Hotchken* (*b*); *Bickham* v. *Cruttwell* (*c*); *Goodwin* v. *Lee* (*d*); for as the testator had consolidated all the mortgages, and made his father's debts his own; they must, therefore, be paid out of his personal estate as directed by the will.

Short v. *Long* (*e*); *Jarman on Wills* (*f*); *Tombs* v. *Roch* (*g*); *Powell on Mortgages* (*h*); *Duke of Ancaster* v. *Mayer* (*i*) were cited.

The MASTER *of the* ROLLS.

July 22. Two questions arise on this will, which I was desirous of considering more carefully before expressing my opinion.

The

(*a*) 4 *Hare*, 201.
(*b*) 10 *Beav.* 426.
(*c*) 3 *Myl. & Cr.* 763.
(*d*) 1 *Kay & J.* 377.
(*e*) 2 *Vern.* 756.
(*f*) *Vol.* 2, *p.* 534, (2*nd ed*).
(*g*) 2 *Coll.* 490.
(*h*) *Pages* 861 *a*, 863 (6*th ed.*).
(*i*) 1 *Bro. C. C.* 454.

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The first question is, whether the legacies given by the codicil are cumulative or substitutional. I am of opinion they are cumulative, and that the second are intended to be given in addition to those already given by the will. One of them in favor of wife is not exactly the same sum, for by the will it is 7,000*l.* and by the codicil it is 6,000*l.*: but this is not the ground on which I principally rely.

By the will, the legacies are given to different persons in express terms; after doing this, he makes a codicil, which is in these terms:—"In case, &c." These legacies might therefore be considered a repetition of those given by the will and to be in substitution for them; but he guards against this, for he expressly says, he wishes this codicil to take effect in addition only to any testamentary document he had already made, and not to cancel or revoke it. That clearly means, that these legacies are given in addition to those he has already given by his will. I think that nothing is to be inferred from the circumstance of his saying, "in case I have not already disposed of my personal property." The fact is, he did not very well remember the contents of his will, and he speaks of it as "any testamentary document I may have already made;" but whatever might be the will which he already made, he expresses his wish that this codicil shall be in addition thereto, and not to cancel or revoke that instrument.

I am of opinion, therefore, that these legacies are cumulative.

The next and important question is, whether the personal estate is first applicable to the payment of the debts, or whether there ought to be an apportionment, so as to apply it rateably with the realty.

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The testator contemplates the possibility of his personal estate not being sufficient to pay his debts and funeral and testamentary expenses, for he "directs his debts, funeral and testamentary expenses to be paid out of his personal estate; but in case it should prove insufficient for those purposes, he directs, that the same should be a charge on his real estate."

In fact, I am merely carrying that direction into effect, and that is the real effect of all the cases on the subject. The fact of his devising the real estate "subject nevertheless to the mortgages affecting the same," is, in my opinion, nothing more than descriptive of the particular property. The consequence is, that the real estate is neither primarily applicable, nor liable to contribute towards payment of the debts, until after the personal estate has been exhausted.

On the other point, also, I am of opinion, that all these mortgage debts are debts of the testator, and that they were, in fact, made so by him. There are many cases on the subject, which I have looked into (*a*), and I have more than once had occasion to consider this question, and I am of opinion, that the rule is this:—that where the owner of property adds mortgages of his own to other mortgages created by his ancestor, and unites them altogether, and makes himself personally liable for the payment of the aggregate sum, the whole mortgage debt then becomes his debt, and if, by his will, he directs his debts to be paid, the consolidated mortgage must be considered as one of them. I think it desirable to avoid making any fine distinction on the subject, which I should be doing if I were to concur in the argument addressed to me, and

(*a*) *See Burham* v. *The Earl of Thanet*, 3 *Myl. & K.* 607.

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and separate the whole debt into different portions, and thus hold that of this 20,000*l.* part was the testator's debt, but the remainder not, when he has added them together, making one charge of 20,000*l.*, and has made himself personally liable by a covenant to pay the whole.

I am of opinion, therefore, in the first place, that the legacies are cumulative; and, in the second, that the personal estate must be applied in the first instance, so far as it extends, in payment of the debts, and that it must be applied in payment of all the debts of the testator, including those which he has made himself liable to pay.

NOTE.—*See* 17 & 18 *Vict. c.* 113; *Swainson* v. *Swainson*, 6 *De G. M. & G.* 648; *Hood* v. *Hood*, 26 *L. J.* (*N. S.*) *Ch.* 616.

PHILLIPS *v.* BRYDON.

July 9, 10.

A power to appoint the "interest" of a fund, held to authorize the appointment of the capital, notwithstanding subsequent powers over and limitation of the said "trust moneys" and the "interest."

BY a voluntary settlement, dated in *February*, 1848, Miss *Brydon* assigned a sum of 650*l.* to two trustees, upon trust to invest, and pay the "interest, dividends and annual produce of the trust moneys" to her for life, for her separate use; and after her decease "to pay and apply the *interest, dividends or annual proceeds*" of the sum of 650*l.*, or other the said trust moneys for the time being, in such manner and to such uses, intents and purposes as she by her will should appoint; "And in default of any such direction or appointment, and so far as any such might not extend, and subject thereto, then in trust to pay, assign and transfer the said *trust moneys* and premises, and the securities whereon the same might at the time be invested, and all interest, dividends and annual produce thereof," unto and amongst

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amongst her children, as she by deed or will should appoint, and in default of such appointment, then amongst all her children equally. And in case there should be none living at her decease, then upon trust "to transfer and assign the said *trust moneys* to such person" as Miss *Brydon* should by will appoint, and in default, to such persons as would have been entitled to the same in case the said Miss *Brydon* had died without having been married and intestate.

In *January*, 1849, Miss *Brydon* married the Plaintiff Mr. *Phillips*. She died in *April*, 1857, leaving issue one child only, who was born shortly before her death.

By her will, dated in *April*, 1856, she directed and appointed that, after her decease, the trustees "should pay and apply the interest, dividends and annual proceeds of the 650*l*., or other the said trust moneys for the time being, unto the Plaintiff *during the term of his natural life*, for his absolute use and benefit." And she further directed and appointed, that from and immediately after her decease, the trustees "should transfer and assign the 650*l*., or other the trust moneys and premises, and the securities whereon the same might be invested, and all interest, dividends and annual produce thereof, unto the Plaintiff *for his absolute* use and benefit.

Doubts having been entertained as to the effect of this appointment, this suit was instituted by Mr. *Phillips*, praying that the rights and interests of himself and the child might be declared.

Mr. *F. T. White*, for the Plaintiff, argued, that the unlimited power to appoint dividends was a power to appoint

appoint the capital; *Haig* v. *Swiney* (*a*). He also cited *Samuda* v. *Lousada* (*b*).

Mr. *Cory*, *contrà*, argued that the settlement made a marked distinction between income and capital, and that there were two powers affecting them separately, the first giving a limited power over the dividends, and the second a power, only to arise in default of children, over the capital. That it was impossible to conceive that two unlimited powers should be given by the same instrument, for the second would be mere surplusage. He insisted, that as the second power had never arisen, the Plaintiff took for life only.

Mr. *Cole* for the trustees.

Mr. *F. White* in reply.

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The question is, whether the power to appoint the dividends of a sum of 650*l.* is, in fact, a power to appoint the capital of the trust fund. Looking at the first power itself, what limit is there as to appointing the dividends? This lady is authorized to appoint the dividends and annual proceeds of the 650*l.* "in such manner and to such uses, intents and purposes" as she may think fit. Why, then, should I limit the power of appointing the dividends to the life of the appointee? Why might she not appoint them for any number of lives, or in perpetuity? and if so, she may appoint the capital. It appears to me, that the power by itself is unlimited.

Then is it cut down by what follows in the deed? In

(*a*) 1 *Sim. & St.* 487. (*b*) 7 *Beav.* 243.

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In default of appointment, the "trust money, and the interest, dividends and annual produce," are given to the children as she shall appoint, and in default equally. There is nothing in this inconsistent with a previous general power of appointment; for the second power always assumes, that there has been no previous absolute appointment.

Then comes the clause which creates the difficulty, which is the direction, that if no children should be living at her death, then "the trust moneys" are to be transferred to such person as Mrs. *Phillips* should by will appoint. Mr. *Cory* asks, what possible object could there be for giving Mrs. *Phillips* a general power of appointing the whole fund by will, and after intermediate limitations, to give her a second power to appoint the capital by will? From thence he argues, that the first power must apply to the dividends only, and the second to the capital, for otherwise the second would be mere surplusage.

I think, however, that this is not sufficient to control what goes before, and that if it were so intended, it ought to have been expressed in more distinct terms. I am, therefore, of opinion, that I cannot cut down the first-mentioned power.

By her will she appoints the dividends to her husband for life, and afterwards directs the trust moneys to be transferred and assigned to him for his absolute use. She, no doubt, was informed, that there was a doubt whether the first power did authorize her to appoint the capital, and therefore she executed the two powers by her will, intending to give everything she could to her husband, so that if one failed the other might operate.

I am

I am of opinion, that a declaration must be made, that the will is a good appointment in favor of the Plaintiff absolutely.

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GOWER *v.* TOWERS.

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Two bequests were made to the same person in successive sentences, and, in the latter, the words "for life" were added. *Held*, that the limitation applied to the second gift only, and that the legatee took the first absolutely.

THE testator by his will, among other bequests, gave as follows:—

"I next give and bequeath to Miss *Jane Longueville Antt*, my dear wife's sister, the interest of all that sum of money which I came into at the death of *John Williams*, esquire, now standing and being in the Three per Cents. Reduced Annuities, amounting to the sum of 2,643*l.* and a fraction And I also give to Miss *Jane Longueville Antt* the interest of all that half of my dear wife's property, should I be the longest liver, which, according to the settlement made on my marriage, will come to me by right of that deed, *for and during the term of her natural life*, for her own and separate use and control, notwithstanding she may be married, and her receipt to be a good and sufficient discharge, notwithstanding her coverture."

The question was, whether Miss *Antt* took the 2,643*l.* for life or absolutely.

The word "And" commenced with a capital letter in the probate.

Mr. *Follett* and Mr. *Elderton*, for the Plaintiff.

Mr. *Selwyn*, Mr. *Nugent*, Mr. *Hoare*, Mr. *Lloyd*,

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Mr. *Fitzhurgh*, Mr. *Teed*, Mr. *Hallett*, Mr. *E. Smith* and Mr. *Fooks*, for the Defendants, contended, that she took a life interest. They cited *Richards* v. *Baker* (*a*); *Rawlings* v. *Jennings* (*b*); *Blann* v. *Bell* (*c*).

Mr. *W. H. Clarke*, for the representatives of Miss *Antt*, was not called on.

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I am of opinion, on this will, that Miss *Antt* took an absolute interest in the 2,643*l*. It is a separate and distinct gift from the one which follows.

If the sentence had run thus:—"I give to Miss *Antt* the 2,643*l*., and also the interest of my wife's property, for life," then there would have been no doubt whatever that the words "for life" would have had the effect of governing the whole sentence; but here the testator makes two separate and distinct gifts. "I give" 2,643*l*., "and I also give" half my wife's property. Besides this, the second bequest is given for her separate use, which restriction, according to plain and grammatical construction, does not apply to the first legacy.

I am of opinion, she took an absolute interest in the first fund.

(*a*) 2 *Atk.* 321.
(*b*) 13 *Ves.* 39.
(*c*) 2 *De G., M. & G.* 775.

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PETERSON *v.* PETERSON.

July 28.

The common administration decree having been made in a suit by one of the next of kin, a second suit was instituted, six months after, by another next of kin, praying additional relief. The Court stayed the second suit, on the Defendant in the first undertaking not to object to any additions to the decree which the Judge in Chambers might think reasonable.

IN the first suit, instituted by one of the next of kin against the administrator, a common decree for accounts had been made in *January*, 1858.

The second suit was instituted by another of the next of kin against the administrator in *July*, 1858, asking additional relief.

Mr. *Follett* and Mr. *Rowcliffe* now moved to stay the proceedings in the second suit.

Mr. *Selwyn* and Mr. *C. Locock Webb*, for the Plaintiff in the second suit.

The claims in this suit are more extensive than in the other, and the relief sought cannot be obtained under the common decree. The second bill alleges that the administrator is indebted as the agent of the testatrix, that he has embarked the assets in trade, and is accountable for the profits, and that he has bought real estate with the assets, thus entitling the parties either to adopt or repudiate the transaction; he is also sought to be charged with an occupation rent.

The Master *of the* Rolls.

If the Defendant in the first suit will undertake to offer no opposition to any matters, not covered by the common decree, which the Judge in Chambers may think

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reasonable, being added to the decree, I will stay all further proceedings in the second suit, and make the costs of that suit costs in the first.

This being acceded to, the order was made.

In re KINGSLEY'S TRUST.

July 26, 31.

A wife obtained an order for protection under the 20 & 21 *Vict.* c. 85, s. 21: *Held*, that she was entitled to payment of a fund in Court representing a legacy bequeathed to her.

THE testator, who died in 1855, bequeathed a sum of 400*l.* £3 per Cent. Reduced to *Ann Woolley*, wife of *Edward Woolley*.

Mrs. *Woolley* had, ever since the year 1845, been deserted by her husband without any reasonable cause, and such desertion had continued to the present time, he having been last heard of in the year 1855 as then living in *New South Wales*.

On the 10th of *April*, 1858, Mrs. *Woolley*, having heard nothing whatever subsequently from her husband, obtained an order, under the hands and seal of three of her Majesty's Justices of the peace for the county of *Somerset*, in petty sessions, in pursuance of the 20 & 21 *Vict.* c. 85, s. 21, protecting all and every the earnings and property of Mrs. *Woolley* acquired since the said year 1845 (being the commencement of such desertion), from her said husband and all creditors and persons claiming under him, and further directing, that all such earnings and property should belong to her as if she were a *feme sole*, which order was within ten days duly entered with the registrar of the county court of *Somersetshire*.

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The act is as follows :—Sect. 21. "A wife deserted by her husband may, at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or, if resident in the country, to justices in petty sessions, or in either case to the court, for an order to protect any money or property she may acquire by her own lawful industry and property which she may become possessed of after such desertion, against her husband, or his creditors, or any person claiming under him; and such magistrate or justices or court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a *feme sole*," &c. &c. The same section proceeds :—"If any such order of protection be made, the wife shall, during the continuance thereof, be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts and suing and being sued, as she would be under this act, if she obtained a decree of judicial separation."

Sect. 25. "In every case of a judicial separation *the wife shall*, from the date of the sentence and whilst the separation shall continue, *be considered as a feme sole*, with respect to property of every description which she may acquire, or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would

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would have gone if her husband had been then dead; provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate."

After obtaining the order, Mrs. *Woolley* applied to the executors for her legacy, but they, for their own protection, paid it into Court under the Trustee Act.

There was issue of the marriage one child only, *Ann Woolley*, who was sixteen years of age.

Mrs. *Woolley* now presented a petition, praying, that, after payment of the costs, the residue of the fund in Court (414*l.* 16*s.* 1*d.* £3 per Cent. Reduced) might be transferred and paid to her, in the absence of and without the concurrence of her husband, as if she were a *feme sole;* or if this Court should deem it right, then that a suitable part only might be paid to her; or that the fund, or a sufficient part thereof, might be settled on her for her separate use, with remainder *to Ann Woolley, her only child.*

Mr. *T. B. Saunders*, in support of the petition.

The MASTER *of the* ROLLS said, that all he could do would be to order the fund to be settled.

July 31. Mr. *Follett* and Mr. *T. B. Saunders* again mentioned the case to the Court, and referred to the terms of the act, by which she was to be considered a *feme sole*

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sole with respect to property of every description. They cited *Dunkley* v. *Dunkley* (*a*); *In re Wright's Trusts* (*b*).

Mr. *Butler*, for the executors, cited *Davison* v. *Mason* (*c*).

The MASTER *of the* ROLLS, on considering the terms of the act, made an order for payment of the fund to the Petitioner.

(*a*) 4 *De G. & Sm.* 570; 2 *De G., M. & G.* 390.
(*b*) 15 *Beav.* 367.
(*c*) 18 *Beav.* 540.

NOTE.—See *Bathe* v. *The Bank of England*, 4 *Kay & J.* 564; 21 & 22 *Vict. c.* 108, *s.* 7; and *Cook* v. *Fuller*, *post*, p. 99.

Re GREGSON.

July 31.

Solicitors employed by the husband to prepare a marriage settlement, *Held* not bound to produce it to the trustees until their bill had been paid.

ON the marriage of Mr. and Mrs. *Evans* in 1857, Messrs. *Gregson*, the solicitors of Mr. *Evans*, were employed by him to prepare the settlement. They accordingly did so, and it was executed by all parties. Their costs amounted to 45*l.* 14*s.* 10*d.* These costs still remained unpaid, and Messrs. *Gregson* retained the settlement in their possession.

Part of the settled property consisted of a house subject to a mortgage for 300*l.* After the marriage, the mortgagees, under a power of sale, sold the property, and after deducting the amount due to them, there remained a balance of 160*l.* They were willing to hand this balance over to the trustees of the settlement, upon being satisfied of their right to receive it, and

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and they, for this purpose, required the trustees to produce the indenture of settlement for their inspection.

Messrs. *Gregson* refused to produce the settlement, until they had been paid their bill of costs for preparing it.

The trustees presented the present petition, insisting, that the solicitors had no lien on the settlement as against them, and praying, that Messrs. *Gregson* might be ordered to deliver it up to them, or at all events, to produce it for inspection, at such times as should be reasonable, for the purpose of enabling them to receive the 160*l.* from the mortgagees, and execute the trusts of the settlement. But if this Court should be of opinion, that the Petitioners ought to pay the 45*l.* 14*s.* 10*d.*, then, that if necessary, the bill of costs might be taxed, and that the Petitioners might be allowed to pay the same out of the 160*l.*

Mr. *R. Palmer* and Mr. *Hoare*, in support of the Petition. The solicitors were never employed by the trustees and have no claim against them for costs, they have, therefore, no lien as against them. Upon the execution of the settlement, new rights and interests arose in favor of third parties, which the solicitors are bound to regard, irrespective of their claims against Mr. *Evans*. Their client, Mr. *Evans*, would be bound to produce it, and they, who are merely his agents, are under the same obligation. It is quite settled by authority, that the lien of a solicitor against his client is always subject to the rights of third parties, and the solicitors who prepared this instrument cannot be permitted to obstruct the trustees in the performance of their duties under it, and thus involve them in serious responsibilities.

responsibilities. They cited *Pelly* v. *Wathen* (*a*); *Furlong* v. *Howard* (*b*); *Hall* v. *Laver* (*c*); *Callow* v. *Howle* (*d*); *Hope* v. *Liddell* (*e*); *Brassington* v. *Brassington* (*f*).

Mr. *Selwyn* and Mr. *J. Sidney Smith*, for the Respondents, were not heard.

The MASTER *of the* ROLLS.

I cannot make the order for production, and I think that some of the cases cited are rather against than in favor of the Applicants.

These trustees claim under the settlor, against whom the solicitors are entitled to a lien for their costs. They are not bound to produce the deed to their client, or to any other persons claiming under him, until they have been paid their costs.

The only order I can make is this:—On the trustees undertaking to pay the solicitors the costs of preparing the settlement, out of the moneys to be received, let the settlement be produced, and, on full payment of such costs, let the solicitors deliver over the settlement to the trustees.

(*a*) 1 *De G., M. & G.* 16.
(*b*) 2 *Sch. & Lef.* 115.
(*c*) 1 *Hare*, 571.
(*d*) 1 *De G. & Sm.* 531.
(*e*) 20 *Beav.* 438; 7 *De G., M. & G.* 331.
(*f*) 1 *Sim. & St.* 455.

1858.

PIGOTT *v.* WILDER.

July 24.

A. devised property to the children of *B.*, in like manner as they were entitled under the "will" of *B.* (deceased): *Held*, that *A.* referred to the will and codicils together of *B.*

A father, having eight children, devised his estate to six of them equally. Afterwards, the wife's father devised another property unto her children, to be vested at the like times, with like benefit of survivorship and provision for maintenance, and in like manner, in all other respects, so far as the nature of the property and the difference of tenure would permit, as the said children were entitled to the estate of their father, under the dispositions and limitations contained in his will: *Held*, that the eight children participated in the second devise.

SIR *FRANCIS J. WILDER*, by his will dated in 1821, devised his real estates to trustees upon trust for his wife for life, and then to sell and invest the proceeds, and hold it upon the following trusts:—

"Upon trust to pay, transfer or assign the same unto and between all and every such of my children by my said wife as, being a son or sons, shall have attained or shall live to attain the age of twenty-five years, or, being a daughter or daughters, shall respectively have attained or shall live to attain the age of twenty-one years, as aforesaid, equally to be divided between or amongst them (if more than one), share and share alike, as tenants in common, and if there shall be but one such child, then the whole to such only child."

He then empowered his trustees to apply the income, in the meanwhile, in the maintenance and education of his children; and he directed, that if any of the children should assign, mortgage, &c., their expectant shares, they should forfeit their interest in favor of the others of them. And he directed the trustees to apply any part of the expectant shares, not exceeding 500*l.*, in placing out any child in a trade or business or as a marriage portion, as to the trustees should seem expedient.

By a first codicil to his will, dated in 1823, after reciting that his eldest son *William* had been amply provided for, the testator revoked, in favor of his other children, the provision he had made for him by his will.

By

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By another codicil, dated in 1824, after reciting that he had settled 4,500*l.* on his daughter *Elizabeth* on her marriage, the testator revoked, in favor of the other children, except *William*, the provisions made for her by his will.

The testator died in 1824, and his will was proved by *William Phillips* and another executor. The testator had eight children by his wife, viz., *William*, *Elizabeth* and six others; the sons all attained twenty-five and the daughters all attained twenty-one.

After the death of Sir *Francis J. Wilder*, *William Phillips* (the father of Lady *Wilder*), made his will, dated in 1828, whereby he devised his windmill and lands at *West Thurrock* to his daughter Lady *Wilder* for life, "and after her decease, unto and amongst the children of the said Dame *Frances Anne Wilder* and their respective heirs, executors, administrators and assigns in equal shares, as tenants in common, and to be interests vested in them respectively, on or at the like ages, days and times, and with the like benefit of survivorship and accruer between them, and with the like provision for their maintenance, education and advancement, and in like manner, in all other respects, so far as the nature of the property and the difference of tenure will permit, as the said children are or shall be entitled to the estate of Sir *Francis Wilder*, their late father, under the dispositions and limitations contained in his will."

Mr. *Phillips* died in 1828, and the parties having agreed to sell the mill and lands at *West Thurrock*, a question arose as to the proper construction of the will of Mr. *Phillips*. The parties now submitted the question for the opinion of the Court upon a special case. The question was stated in the following terms:—

"Whether, according to the true construction of the will

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will of *William Phillips*, the mill and lands at *West Thurrock* became divisible amongst the eight children of Lady *Wilder*, or the parties claiming under them, respectively, in equal shares; and whether, therefore, the money arising from the sale thereof is now divisible amongst the eight children or the parties claiming under them, respectively, or whether the mill and lands became divisible amongst the children of the said Dame *Frances Anne Wilder* (exclusive of *William* and *Elizabeth*), in equal shares, and whether, therefore, the said money is now divisible amongst the six children or the parties claiming under them, respectively, or to whom and in what shares such money is now payable."

Mr. *Jessel*, for the Plaintiffs. First, the word "will" means the whole testamentary instruments including the codicils (*a*).

[*The* MASTER *of the* ROLLS: That is my opinion; I must take the whole together to be the will of the testator.]

Secondly, the class to take under the will of Mr. *Phillips* is the same as that entitled under the will and codicils of Sir *Francis Wilder*, for how can the vesting, the benefit of survivorship, the right to maintenance, &c. apply to children who take nothing under the will referred to? They are to take "in like manner, and in all other respects" as under the limitations of their father's will; to include persons who are not takers under the father's will would be to give it in a manner and to a class very different from those pointed out by the first testator's will. It is impossible that the six can take in the same manner, if two other persons are admitted to participate in the devise.

The

(*a*) *See Gordon* v. *Lord Reay*, 5 *Sim.* 274; *Crosbie* v. *Macdoual*, 4 *Ves.* 610.

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The fund is therefore divisible into sixths, and *William* and *Elizabeth* are excluded. He cited and commented on the following cases:—*Doughty* v. *Saltwell* (*a*); *Longdon* v. *Simson* (*b*); *Ross* v. *Ross* (*c*); *Milsom* v. *Awdry* (*d*); *Shawe* v. *Cunliffe* (*e*); *Davies* v. *Hopkins* (*f*).

Mr. *Bristowe*, in the same interest. The maintenance and advancement clauses cannot apply to persons who under their father's will take nothing.

Mr. *Bird*, for the Defendants, was not heard.

The MASTER *of the* ROLLS.

I am of opinion, on this will, that all the children take, and that the fund is divisible into eighths. There is no inflexible rule on the subject, and the question really is, what did the testator intend? In all cases of this description, you must first ascertain what is the class intended to take; and, secondly, what are the limitations affecting the persons who take. There can be no question, that express words of reference may either enlarge or restrict the class, as in *Shawe* v. *Cunliffe* (*e*), where the gift was to "such children," and Lord Commissioner *Eyre* held them to be those previously mentioned.

In the present will the testator, in the first place, gives the property "amongst the children of" Lady *Wilder*. That, *primâ facie*, means all the children. Then, how are they to take "in equal shares as tenants in common," that is, they are all to take as tenants in common, "to be interests vested in them respectively on or

(*a*) 15 *Sim.* 640.
(*b*) 12 *Ves.* 295.
(*c*) 2 *Coll.* 269.
(*d*) 5 *Ves.* 465.
(*e*) 4 *Bro. C. C.* 143.
(*f*) 2 *Beav.* 276.

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or at the like ages, days and times, and with the like benefit of survivorship and accruer between them, and with like provision for maintenance, education and advancement, and in like manner, in all respects, so far as the nature of the property and the difference of tenure will permit, as the said children are or shall be entitled to the estate of Sir *Francis Wilder*, their late father, under the dispositions and limitations contained in his will."

They therefore take in the same manner, *reddendo singula singulis.*

The only question is, whether the words, "as the said children," cuts down the class or refers to the manner in which they take; and I am of opinion, that they do not refer to the shares or to the class; but, these being ascertained, that they have reference to the mode of vesting, &c., in which the six take under the will of their father.

It is to be observed, that it is not "in like manner" as the said children under their father's will are entitled, but "in like manner in all other respects, so far as the nature of the property and the difference of tenure will permit." They are to take equally, as tenants in common, at the like ages, their interests to vest at the like times, with like survivorship, accruer and provisions for maintenance, education and advancement, and so far as the nature of the property will permit in like manner as the children take under the will of their father.

I am of opinion, that the words "as the said children" apply to the manner in which they are to take and not to the class to take, consequently the fund is divisible into eighths.

1858.

ELSEY *v.* COX.

March 16.

On setting aside a voluntary settlement, made by a trader while insolvent, in favor of his wife and an infant child, the Court, as to the costs of the trustees and infant, *Held*, that the utmost it could do was to make the decree without costs.

IN 1854, Mr. *Samuel Adams* (a banker) executed a voluntary settlement, whereby he conveyed real estates to two trustees, on trust for his wife for her separate use for life, and afterwards on trust for his children and issue.

The settlor's assets were at the time insufficient to pay his liabilities, and, in 1856, he was declared bankrupt. His assignees instituted this suit against the bankrupt, his wife, his only child (an infant of ten years) and the trustees, to obtain a declaration that the settlement was fraudulent and void as against the creditors, and to have it cancelled.

Mr. *R. Palmer* and Mr. *Hardy* for the Plaintiffs, cited *Townsend* v. *Westacott* (*a*).

Mr. *Follett* and Mr. *Giffard*, for the trustees, asked for their costs.

Mr. *Renshawe*, for the infant Defendant, asked for her costs of the suit, on the ground that she had not been a party to the deed or to any fraud, that she had taken no part in the suit, to which she was a necessary party. He said that, under similar circumstances, Lord *Cranworth* had given all parties, other than the settlor, their costs, in the case of *Goldsmith* v. *Russell* (*b*).

The

(*a*) 2 *Beav.* 340; 4 *Beav.* 58. (*b*) 5 *De G., M. & G.* 556.

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ELSEY v. COX.

The MASTER *of the* ROLLS, held that the deed could not stand, and as to the costs, he said that the Defendants who asked for their costs took under a person who had committed a fraud, and that the utmost the Court could do, was to say, that they were not to pay costs.

LLOYD *v.* LLOYD.

July 31.

Power to appoint to children, "with such directions or regulations for maintenance, education and advancement as their mother should appoint." The mother appointed the income to the children's father until the youngest attained twenty-one, "in or towards the maintenance and education" of all her children: *Held*, that the appointment was invalid.

THE testator gave a moiety of some trust funds, in trust for his daughter *Sophia Barclay* for life, and after her decease, he directed, that the trust funds "should be and remain in trust for the benefit of all or any one or more of the children, grandchildren or other issue of his daughter *Sophia* (such grandchildren or other issue to be born in her lifetime), for such interest or interests, and in such parts, shares or proportions, and subject to such conditions, restrictions and limitations in favor of any other or others of the children, grandchildren and other issue, and with such *directions or regulations for maintenance, education and advancement*, and to be transferred or assigned at such age or ages, either absolutely or upon such contingencies as his daughter *Sophia* should appoint; and in default of appointment, in trust for all and every the children of his daughter *Sophia* living at his decease, or born afterwards, who, being a son or sons, should live to attain the age of twenty-one years, or, being a daughter or daughters, should live to attain that age, or be married with the consent of the trustees."

Sophia Barclay had five children. By her will, she appointed the trust moneys, "upon trust to pay the dividends,

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dividends, interests and income thereof, as the same should become due, until her youngest child who should arrive at the age of twenty-one years should have attained that age, unto her said husband *Hugh Barclay*, in case he should so long live, *in or towards the maintenance and education* of all their children, in such manner and proportions as her said husband should think fit. And after the decease of her husband, in case he should die before her daughters *Agnes Kinnear* and *Florence* should respectively attain the age of twenty-one years, upon trust to pay the dividends and income of the said trust funds, until her said daughters should respectively attain the age of twenty-one years, unto her (the testatrix's) brother *Francis Lloyd*, or other the administrator for the time being of that her will, to be laid out and expended by him in the maintenance, education or advancement of her said daughters respectively, in such manner as he should think fit, until her said daughters should respectively attain the age of twenty-one years. And when and so soon as the youngest of their (the said testatrix and her husband *Hugh Barclay*) children who should arrive at the age of twenty-one years should have attained that age, in case her husband should live until that period, or in case he should die before that period then immediately after his decease, if her said daughters should then have respectively attained the age of twenty-one years, or as soon after his decease as her said daughters should respectively attain that age, upon trust to pay, transfer and assign one moiety of the principal of the said trust moneys, stocks, funds, securities and accumulations, together with all interest to become due thereon since the last day of payment, unto each of her daughters *Agnes Kinnear* and *Florence*, for her own absolute use and benefit, or to her executors, administrators or assigns. And in case either of her

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said daughters should die under the age of twenty-one years, upon trust to pay, transfer and assign her intended share of and in the said trust moneys, funds, securities and accumulations unto such of her (the said testatrix's) children as should be then surviving, in equal shares and proportions.

The question was, whether this was a valid appointment of the income.

Mr. *Amphlett* for Mr. *Hugh Barclay* and his sons in support of the petition.

Mr. *R. Palmer* for the two daughters.

The MASTER *of the* ROLLS, after referring to the case of *Hammond* v. *Neame* (*a*), declared, that the appointment of the income to Mr. *Barclay* for the maintenance and education of his children was void, and that such income belonged, as an unappointed fund, under the testator's will, to such of the children as might acquire vested interests. And he declared that two children who had attained twenty-one were each entitled to vested interests in one-fifth part of such income, and he ordered payment to them and the investment and accumulation of the other three-fifths until further order.

(*a*) 1 Sim. 35.

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COOKE *v.* FULLER.

July 31.
Aug. 2.

A wife was deserted by her husband. Afterwards, her father bequeathed a fund for her separate use, without power of anticipation, and she subsequently obtained a protecting order under the 20 & 21 *Vict.* c. 85, s. 21: *Held*, that she was entitled to payment.

IN 1826, the Plaintiff *Sophia Anne Cooke* married *Richard Cooke*. They lived together about eight months, when, in consequence of his violent and improper conduct, she returned to her parents. In 1846, *Richard Cooke* was convicted of bigamy, and transported for seven years.

Mrs. *Cooke's* father, by his will, gave 10,000*l.* to trustees, upon trust to invest, and, during the life of *Sophia Anne Cooke*, to pay and apply the interest, dividends, &c. &c., "unto or into the hands of such person or persons as *Sophia Anne Cooke*, whether covert or sole, shall, by any writing under her hand and seal, from time to time, *but not in the way of anticipation* of any annual payment, direct or appoint, to the intent that the same may be for her sole and separate use, and not subject to the debts, control or engagements of her husband; and I direct that the receipt or receipts alone of *Sophia Anne Cooke* for the interest, dividends or annual produce of the said trust funds, or of the person or persons whom she shall so appoint, from time to time, to receive the same, shall, whether she shall be covert or sole, be an effectual discharge or effectual discharges for the sum or sums therein mentioned or acknowledged to be received."

After her decease, the fund was given upon such trusts, &c., as she should by deed or will appoint, and in default, to her next of kin. The testator died in 1845, and, under a power contained in the will, the

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trustees had paid one-half the fund to Mrs. *Cooke*; the other moiety remained vested in the trustees.

In *May*, 1858, Mrs. *Cooke* appointed the fund to her only child *Sophia Cooke*, to whom she also assigned her life interest in the trust fund.

On the 9th of *July*, 1858, Mrs. *Cooke* obtained an order from a magistrate, under the 20 & 21 *Vict.* c. 85, s. 21, protecting her property from her husband (*a*). On the 21st of *July*, 1858, she made a second appointment of her life interest to her daughter. Mrs. and Miss *Cooke* now presented a petition for payment of the fund to Miss *Cooke*.

Mr. *R. Palmer* for the Plaintiff.

Mr. *Lloyd* and Mr. *Karslake* for the Defendants, the trustees.

The MASTER *of the* ROLLS said he would look at the terms of the Act, and send the proper order to the Registrar.

Aug. 2. *The* MASTER *of the* ROLLS sent the following order:—"I think the Petitioner is entitled to an order according to the prayer. The 21st section of the Act (20 & 21 Vict. c. 85) seems to me to be conclusive on the subject."

(*a*) See the case, *In re Knight's Trust*, ante, p. 84.

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In re THE MORAVIAN SOCIETY.

July 30.

Trustees of a charity were disqualified on "departing the United Kingdom, from whatever cause or motive, or under whatsoever circumstances:" *Held*, that a temporary absence abroad was not within the proviso.

BY indenture, dated in 1853, certain real and personal estates were conveyed by Mrs. *Bates* to seven trustees, as to two-fourths of the income, upon trust to apply and dispose of the same for the general purposes of maintaining, supporting and advancing the missionary establishments among heathen nations of the Protestant Episcopal Church, known by the name of the *Unitas Fratrum*, or United Brethren; and as to one-fourth thereof, for or towards the maintenance, support and education of the children of ministry and missionaries of the said Church, educated at the school or schools and academy or academies at *Fulner*, near *Leeds*, in the county of *York*, or for the benefit and purposes of any similar school, academy or establishments elsewhere within the United Kingdom of *Great Britain* and *Ireland;* and as to the remaining one-fourth, upon trust to pay, apply and dispose of the same for or towards the maintenance and support of certain establishments appertaining to the said Church for single persons, called Choir Houses, within the United Kingdom.

The deed provided, "that if any or either of the trustees *should depart the United Kingdom, from whatever cause or motive or under whatsoever circumstances*, every trustee so departing the United Kingdom should, immediately upon his departure, be and be considered as thereby discharged and disconnected from the trusts and duties by the said indenture created and imposed; and the office of trustee, and all duties, trusts and confidences,

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In re The MORAVIAN SOCIETY.

fidences, powers and authorities, matters and things appertaining thereto, and all and singular the trusts, estates and hereditaments, moneys, stocks, funds, securities and premises, for the time being subject to the trusts aforesaid, and all estate and interest therein, should, immediately thereon, be and be considered as, and should become, divested out of or extinguished as to him the said trustee on departing the United Kingdom, in like manner and as fully and absolutely to all intents and purposes as if he were dead."

Two of the trustees (Mr. *Latrobe* and Mr. *Rea*) had both been temporarily absent from the United Kingdom while trustees.

This was a petition for the appointment of new trustees, and for vesting the trust property. The question raised was, whether trustees who went beyond the limits of the United Kingdom, for a temporary purpose only and with the intention of returning, became disqualified to act as trustees.

It was stated, that the persons connected with the United Brethren, who were the most fit to be appointed trustees, were those who were most likely to go on frequent visits to the Continent and elsewhere, in connection with the interests of their Church.

Mr. *R. Palmer* and Mr. *W. Morris* in support of the petition.

The MASTER *of the* ROLLS was of opinion, that a trustee who might be temporarily absent from this country, without intending permanently to reside abroad, did not "depart the United Kingdom," or vacate his trust, within the meaning of the trust deed, and he declared that

that no appointment of new trustees was necessary on the ground of such temporary departure.

1858.

In re The Moravian Society.

Note.—See the decisions on the words "depart this realm" in the Bankrupt Act, 12 & 13 *Vict. c.* 106, *s.* 67, and *Ex parte Mutrie*, 5 *Ves.* 576; *Warner* v. *Barber*, *Holt*, *N. P.* 175; *Windham* v. *Paterson*, 1 *Starkie*, 145.

GROVE *v.* PRICE.

June 4.

By a marriage settlement, a debt due from *A.* was assigned to *A.* and *B.*, upon trust, "with all convenient speed," to get in and invest in Consols. For two and a half years *B.* took no steps to get in the money, and *A.* then became bankrupt: *Held*, that *B.* was responsible for the loss.

IN *June*, 1819, on the marriage of Mr. and Mrs. *Hudson*, a sum of 300*l.*, due to her on personal security and other property, were assigned to *Price* and *Cowley*, upon trust, "with all convenient speed," to collect, get in and invest the said trust moneys, in their names, "upon government or real securities," and hold upon trust for Mrs. *Hudson* for life, and afterwards for Mr. *Hudson* for life, and then for the younger children of Mrs. *Hudson* by a previous marriage.

The 300*l.* referred to was due to Mrs. *Hudson*, on a promissory note, from *Price*, the trustee. It was not paid, but in *March*, 1820, *Price* gave a substituted note for 385*l.* to Mrs. *Hudson*. *Price* became a bankrupt in *February*, 1822, and the money was lost except to the extent of 3*s.* 6*d.* in the pound, which was received by Mr. *Hudson*.

Mrs. *Hudson* died in 1829 and Mr. *Hudson* in 1852, and the suit was instituted in 1853, and, by amendment in 1855, it sought to make the representatives of *Cowley* and of Mr. *Hudson* liable for the trust fund lost.

Mr.

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GROVE v. PRICE.

Mr. *R. Palmer* and Mr. *Freeling* for the Plaintiffs, the children of the first marriage.

Mr. *Elderton* for the representatives of *Cowley*. The trustee, having done all in his power to recover the money, is exonerated, no steps which he could have taken would have had the effect of recovering the amount from *Price*, who was insolvent and shortly afterwards declared bankrupt; *Clack* v. *Holland* (*a*).

Cowley's estate cannot be charged, unless it has been shewn that the money could have been recovered from *Price* before his bankruptcy; *East* v. *East* (*b*).

The MASTER *of the* ROLLS.

I cannot come to that conclusion. *Cowley* agreed "with all convenient speed" to get in the debt, and invest it in Consols: he takes no steps whatever to do so, and, in fact, does nothing. He allows the note to be delivered up and another note to be given, and two and a half years afterwards the debtor, who is his co-trustee, becomes bankrupt, and pays 3*s.* 6*d.* in the pound.

The burthen of proof lies on *Cowley's* representatives to shew, that if steps had been speedily taken, the money could not have been recovered. They have failed in satisfying me that such is the case, and therefore the probability is that the whole might have been recovered.

Another

(*a*) 19 *Beav.* 252. (*b*) 5 *Hare*, 348.

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GROVE v. PRICE.

A husband, being held liable at the suit of the children of his wife's first marriage to replace trust funds received by him, claimed a large sum expended in maintaining, &c. the children after the second marriage. The claim was disallowed.

Another point arose under these circumstances:—Mr. *Hudson* had personally received some of the trust moneys, with which the bill sought to charge his estate; on the other hand, his executor, *Jones*, claimed to be allowed sums, which it was suggested his testator had paid for the benefit of the Plaintiffs and the other children of his wife's first marriage, who, after the second marriage and during their infancy, resided with Mr. and Mrs. *Hudson*.

After Mr. *Hudson's* death, an account book was found in his handwriting, debiting the children of Mrs. *Hudson* (*Mary Grove*, *Richard Grove* (Plaintiff), *Ann Grove* (Plaintiff), *Hariett Grove*, *Caroline Grove* (Plaintiff) and *William Grove*) with various sums expended by him for their board, clothing, lodging, education, &c., during their infancy.

The account ended thus:—

"Total, what I consider is due to me, 1,157*l*. The account to be brought forward against them, if they make any demand, after my decease, on anything that is left by me to whom I may assign or bequeath in my will.

"*Joseph Hudson*."

Inquiries, as to these matters, were directed by the decree, and the Chief Clerk found as follows:—

The trust property possessed by *Joseph Hudson* consists of the sum of 317*l*. 13*s*. received by him in respect of book debts due and owing to his wife. The sum of 63*l*. 18*s*. 6*d*. being a dividend of 3*s*. 6*d*. in the pound on the sum of 385*l*. 8*s*. 9*d*. due for principal and interest on the said promissory note of *James Price*, which was proved under his bankruptcy by *Joseph Hudson*, certain articles of furniture of the value of 14*l*.

"Save

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"Save and except such evidence, if any, as is contained in the account book, headed 'Mrs. *Mary Hudson's* Children, Dr. to me *Joseph Hudson*,' there is no evidence that *Joseph Hudson*, during his life, paid any sums to or for the benefit of the living or deceased children of *Henry Hudson*, but the children named in the account resided with *Joseph Hudson* and *Mary Hudson*, during some part of the respective periods in the said accounts severally stated with respect to such children, respectively, but there is no evidence of the precise time during which such children respectively so resided with *Joseph Hudson* and *Mary* his wife, except as to *Caroline Hutton*, who resided eight years, and *Ann Grove*, who resided five years with them."

The representatives of Mr. *Hudson* moved to vary the certificate, by finding, that the children were severally indebted to Mr. *Hudson* in the sums set opposite to their names, amounting in the whole to 1,157*l.*

Mr. *Southgate*, in support of the motion, relied on *Worthington* v. *M'Craer* (*a*), where the Court had allowed a sum expended for an infant in putting him apprentice.

Mr. *R. Palmer* and Mr. *Freeling* were not called on.

The MASTER *of the* ROLLS.

The Defendant *Jones* has not produced any evidence, except the entry made by the testator himself, which

(*a*) 23 *Beav.* 81.

which is not evidence on his own behalf, and I think that this claim cannot be allowed.

In *Worthington* v. *M'Craer* (*a*), I said, that the infant had been maintained and supported, from feelings of kindness and charity, by his uncle, who had no right to repayment out of the property of the infant. This is a case of the same description. It would be a different matter, if the trustees had made advances for maintenance on the security of the trust fund. I am of opinion, that *Hudson's* representative has made out no case, and that he must make good the whole of the moneys received by *Hudson*. Being called on to replace the trust funds which the testator has received, he says, that the Plaintiffs many years ago owed the testator a sum of money, which he insists on setting off. Even if there had been evidence of the facts alleged, I should not have been able to enforce the claim; but there is no evidence.

Mr. *Hudson* maintained the children of his wife out of feelings of kindness and benevolence, and this claim is now raised merely as the means of getting rid of a liability.

(*a*) 23 *Beav.* 81.

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May 4, 24.

The word "son," in connexion with the words "heir" and "issue," *held*, by force of context, to mean issue male.

General intent to create estates tail held to prevail, notwithstanding inconsistent expressions.

The word "son" is quite as flexible as the word "heir," and can as easily be read "issue male" as the word "heir" can be turned into "son."

A testator appointed *A. B* "his universal heir:"—*Held*, that these words were sufficient, if uncontrolled, to give the fee-simple.

THE testator *Thomas Jenkins*, of the City of *Rome*, made his will dated the 15th of *September*, 1797, whereby he made several bequests "to my heir," and proceeded in these words:—

"To said *John Lord Rolle*, my nephew *Joseph Jenkins*, son of my brother *William* deceased, and to my beloved niece *Charlotte Jenkins*, daughter of the same, I give, devise and bequeath all my lands and effects in *Devonshire*, in the kingdom of *England*, or elsewhere, be they lands, hereditaments, perpetuities and every kind of effects whatsoever, named or not named, on the following conditions—declaring the said *John Lord Rolle*, *Joseph Jenkins* and *Charlotte Jenkins* executors of this my last will, their heirs and assigns, for the forenamed disposition of my effects in this my will, and for the further disposition that I shall hereafter make."

He then directed them to cause to be paid certain legacies, and an annuity, from the income of his estate, to his nephew *Thomas Jenkins* during his life, and directed the pecuniary legacies to be paid by his "executors and heir," and "executors and heirs," and made some specific devises. Then followed the devises on which the question turned, and which the Court, for facilitating the references to the different passages, numbered as follows:—

1. "I name and appoint my universal heir my great nephew *Thomas Jenkins*, eldest son of my nephew *William*,

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liam, to whom I give all my lands and effects in *Devonshire*, in the kingdom of *England*, or elsewhere, be they lands, hereditaments, perpetuities and every kind of effects whatsoever, named or not named, on the following conditions, that he may not be put into possession of any of the said estates or effects until he arrives at the age of twenty-one years.

2. "I declare my said great nephew and godson *Thomas Jenkins* to be my universal heir.

3. "I direct that from my death the sum of 200*l.* per annum may be by my executors paid for his education.

4. "If my said great nephew *Thomas* should marry and have a child or children, if living at his death, I will and direct that my estates do descend to his eldest son, and if he has other legitimate children, that out of my said estates, be paid the sum of 1,000*l.* to each of the said children, be they male or female, but if it should happen that he leaves one daughter only, in such case that she shall have out of my estates the sum of 3,000*l.* sterling.

5. "It is always to be understood, that if my great nephew *Thomas* should have more sons than one, if the eldest son should die before his father, he is to be succeeded by his second son, and so on to the third, &c.

6. "The eldest son of my godson *Thomas*, who may be living at his father's death, is always to be considered as heir to my estates.

7. "Should it happen that my said great nephew *Thomas* leaves no male child, to as many females as may be living at his death, my will is, that the sum of 2,000*l.* sterling be given to each female, and if but one daughter only,

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only, the sum of 3,000*l.* sterling, as expressed in the foregoing page.

8. "If my godson and great nephew *Thomas* should not leave any son at his death, I then direct that his next brother, and second son of my nephew *William*, succeed to my estate, and so on, in case of failure of male heirs, to the third, fourth, &c.

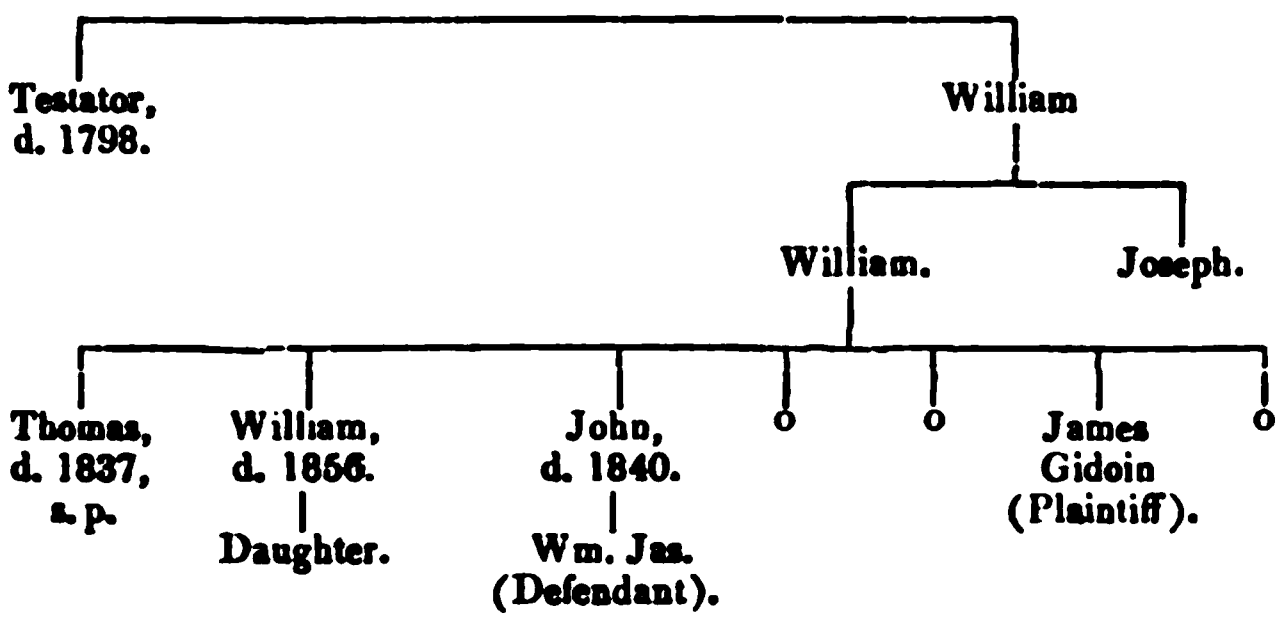
9. "The eldest great nephew living always is to be considered as my legitimate heir, in case of failure of the other brothers, my express will and desire being, that my estates do always descend in the male line.

10. "It is always to be understood, that in case my estates descend from one great nephew to another, the same conditions as to the sum to be paid to such females as may be left are to be observed to all whose father may die without heir male as is expressed in favor of the daughters females of my great nephew *Thomas*.

11. "Should it happen that all the sons of my nephew *William* should die without leaving a son or sons, in such case my will is, that my estates do devolve and be the property of my nephew *Joseph Jenkins*, son of my brother *William*, on the same conditions relative to his heirs and descendants, male and female, as is expressed regarding my great nephew *Thomas* and his brothers; and if my said nephew *Joseph* should die without a legitimate son, I then direct and devise that my said estates descend to my nephew *Thomas* and his heirs, on the same conditions as expressed relative to his brother *Joseph*."

The testator died in *May*, 1798. The state of his family

family will be better understood by the following pedigree :—



On the 17th of *May*, 1803, the testator's great nephew *Thomas Jenkins* attained his age of twenty-one years, and was thereupon let into possession of the residue of the testator's real estate; and in *Michaelmas* Term, 1810, he suffered a recovery of the estates (except a small portion), and declared the uses thereof to himself and his heirs in fee simple.

In 1814, the testator's nephew *Thomas Jenkins*, the annuitant, died, and in 1816 the great nephew *Thomas Jenkins* and his next eldest brother *William Jenkins* joined in a recovery, which was accordingly duly suffered by them in *Trinity* Term in that year, of all the estates, the uses of which were declared to be to the same *Thomas Jenkins* and his heirs.

In 1837, the testator's great nephew *Thomas Jenkins* died without leaving issue, and on 17th *April*, 1856, his next brother *William Jenkins* died without male issue, leaving two daughters. The next brother *John* died in 1840, whose eldest son *William James Jenkins* was a Defendant. The fourth brother was the Plaintiff *James Gidoin Jenkins*.

This

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This suit was instituted by *James Gidoin Jenkins* against Lord *Clinton* (the heir of the surviving trustee); against the two daughters of *William*, who, as the bill stated, claimed to have the sum of 2,000*l.* each raised and paid them out of the testator's residuary real estate, pursuant to the directions contained in the will; against *William James Jenkins* (claiming in priority to the Plaintiff); against *Hughes* (who purchased a part of the property from the great nephew *Thomas Jenkins* between the date of the two recoveries); and against *Gordon* and *Lott* (who purchased other part of the property after the date of the last recovery), praying that the trusts of the will might be performed, and for an account of the rents.

The Defendants *Gordon* and *Lott* demurred to this bill, on the ground that, in the events that had occurred, the Plaintiff had no title to or any interest in the property which passed by the testator's will. The principal questions were these:—whether, under the will of the testator, his great nephew *Thomas* or his great nephew *William Jenkins* took an estate tail in the lands devised by his will. If either of those persons took an estate tail, that estate having been barred, the Plaintiff had no title. But if these questions were decided in favor of the Plaintiff, then a question arose whether, on the true construction of the will, the estate was not vested in *William James Jenkins*, a Defendant, the son of *John*, the third great nephew of the testator.

Mr. *Shapter* and Mr. *Fooks* in support of the demurrer.

It has been twice decided by this Court, and once by the King's Bench, that the great nephew *Thomas Jenkins* took an estate tail.

It

It appears (*a*) that the great nephew *Thomas Jenkins*, between the date of the two recoveries, sold a part of the estate to one *Gould*, who objected to the title, and a bill for specific performance having been filed against him, a case was sent to the Court of King's Bench, which certified that the great nephew *Thomas* took an estate tail, and thereupon Sir *Thomas Plumer*, V.C., decreed specific performance.

Lord *St. Leonards*, in a note to his Treatise on "*The Law of Property as administered by the House of Lords*," says (*b*), that "if he recollects rightly," there was no contract with *Gould*, but that one was merely suggested, in order to obtain the opinion of the Courts. This imperfect recollection ought not to detract from the importance to be attached to those judgments.

Thomas Jenkins, the great nephew, also made another sale to *Herries*, between the dates of the two recoveries, and he instituted another suit for specific performance. There is no doubt but that this was a genuine transaction. The Master reported in favor of the title, and exceptions being taken to his report, were overruled (*c*) by Sir *John Leach*, V.C. From this order there was an appeal to the House of Lords, but the appeal was directed to stand over until there should be a decree on further directions (*d*). The reason suggested for this course was, that the judgment of the House of Lords that the Master was right in finding that the title was good, would be a useless proceeding if the Court,

(*a*) 4 *Madd Rep. pp.* 80, 81.

(*b*) *Page* 257.

(*c*) *Jenkins* v. *Herries*, 4 *Madd. Rep.* 67. It is, by error, stated, at p. 82 of that report, that there was a decree for specific performance, instead of stating that "exceptions were overruled."

(*d*) 6 *Simons*, 168 *n* ; *Sir Edward Sugden's Treatise on the Law of Property*, p. 257.

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Court, on further directions, should be of opinion that it was not so clearly good as to be forced upon a purchaser.

Lord *St. Leonards* (*a*) observes on the singularity of this order, which was dated the 14th *February*, 1823; but it was probably by arrangement, for on search being made to discover whether any judgment was given by the House, the information obtained was as follows:—"The parties in *Jenkins* v. *Herries* having come to an amicable settlement, the appeal was, by consent, on the 18th *February*, 1823, withdrawn, without payment of costs. Consequently, no judgment was given on the appeal."

There is no ground for Mr. *Preston's* statement in 1 *Barn. & Cr.* p. 744, that the House of Lords reversed Sir *John Leach's* order.

Lord *St. Leonards* (*b*) considers it clear that the devise to the trustees to raise an annuity, and to retain possession and not put the great nephew in possession till 1821, vested the legal fee in the trustees; and he says, that that devise was omitted in the statement of the case to the King's Bench, for otherwise that Court would not have given its opinion. It, however, was a question whether the legal fee was in the trustees, or remained in them till the great nephew *Thomas* attained twenty-one, or during the life of the annuitant (*c*). It was on this account, that in 1816, after the annuitant was dead, the second recovery was suffered.

The

(*a*) 2 *Prod. & Pur.* 104 *ed.* p. 173.

(*b*) *Preston on Real Property Law*, p. 238, *note* (1).

(*c*) 4 *Madd.* 74, 80, 81.

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The first recovery was open to the question whether the legal freehold, during the life of the annuitant, was not in the trustees, with legal remainders over; in which case, that recovery would have been invalid for want of a good tenant to the *præcipe*.

But assuming that the great nephew *Thomas* or his brother *William* (both of whom were vouched in the second recovery) was a tenant in tail, the second recovery was valid, either as a good legal or as a good equitable recovery; for whether the estates tail were legal or equitable, there was, at the time of suffering the second recovery, no preceding estate in anyone not a party to the recovery who should have been tenant to the *præcipe*. As the bill alleges, truly, that the sale to *Gordon* and *Lott* was after the second recovery, their case is stronger than those of the Defendants in the two former chancery suits.

It is admitted that the opinions expressed by the Judges in those suits are not binding authorities, as between the parties to this suit; but they are of the greatest weight. There is no direction to convey or settle in the will; there is no executory trust, and therefore, whether the beneficial gifts be legal or equitable, they must be construed in the same way.

The declaration that the great nephew *Thomas* is to be "universal heir," and that the estates should "descend" from him to his sons, in succession, and that they are to "descend in the male line," and that the next great nephew *William* should "succeed to my estate, and so on, in case of failure of male heirs, to the third and fourth" great nephew, shews clearly that the great nephews were to take estates tail.

The

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The expression "not leave any son" can only, with reference to the context, mean, "without leaving issue male."

The general scheme and intention is plain, and the particular form of inaccurate expression must yield to and not defeat it.

The suit is defective, because the personal representative of the testator is not before the Court.

Mr. *Roundell Palmer* and Mr. *Hanson* in support of the bill. The testator, in the gift of his property to the trustees of his will, uses the words "heirs and assigns," and there are no subsequent expressions which have the effect of cutting down their estate, nor can any definite time be fixed within which their duties are to determine; consequently, they take a fee simple, and the legal estate is now vested in the representative of *Lord Rolle*, who was the surviving trustee, and the suit is properly constituted; *Doe* v. *Davies* (*a*); *Blagrave* v. *Blagrave* (*b*); *Doe* v. *Cafe* (*c*); *Poad* v. *Watson* (*d*).

As to the past decisions on the construction of the will, they are not binding on the Plaintiff, and do not relieve the Court from now exercising its own independent judgment on the subject. There is no report of the special case which was argued in the King's Bench, so that it is impossible to ascertain what it was that convinced the Court, or what were the grounds of the certificate, that *Thomas* took an estate tail; the certificate certainly appears wrong, in declaring that he

(*a*) 1 *Q. B.* 430.
(*b*) 4 *Exch.* 550.
(*c*) 7 *Exch.* 675.
(*d*) 6 *Ellis & B.* 606.

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he took an estate in tail general, and it was, in all probability, a collusive case. The House of Lords clearly did not adopt Sir *J. Leach's* decision in *Jenkins* v. *Herries* (*a*), although Mr. *Preston*, who was one of the Counsel in the cause, probably went too far when he said (*b*) that "the House of Lords reversed the order of the Court of Chancery;" still the decision of Sir *J. Leach* cannot be considered, under all the circumstances, as of any great weight.

As to the proper construction of the will, we submit that the testator's eldest great nephew *Thomas Jenkins* took, not an estate tail, but an estate in fee simple, subject to executory gifts over in fee, in favor of his eldest surviving son, or brother, or uncle. If the estate over vested in a son, there was no further disposition of the property, but until that happened, all *Thomas's* surviving brothers were to take successively estates in fee simple, subject to similar executory gifts over; and therefore, in the events which have happened, the Plaintiff, as the only surviving brother, became, on the death of his elder brother *William* without leaving a son, tenant in fee simple of the estate devised by the will.

First. The testator's declaration that *Thomas* was to be *his universal heir* was sufficient, standing alone, to give him the whole equitable fee; *Marret* v. *Sly* (*c*).

Secondly. The direction, that if he had a child living at his death, the estates should descend to his eldest son, would, in like manner, pass the fee to the son; *Macaree* v. *Tall* (*d*); *Roe* v. *Bacon* (*e*). The direction in

(*a*) *Sugd. V. & P. Vol.* 2, *pp.* 173. 180 *of* 11*th edit., and p.* 235 *of* 13*th edit.; Sugd. Law of Property*, 256, 673.

(*b*) 1 *B. & Cr.* 744.
(*c*) *Sid.* 75.
(*d*) *Amb.* 182.
(*e*) 4 *M. & S.* 366.

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in fact is, that the eldest son of *Thomas living at his father's death* is to be heir to the estates, and these words ought not to be rejected, *Towns* v. *Wentworth* (*a*), as they must be if *Thomas* be held to take an estate tail. The cases shew, that an express estate for life, or in fee, is not enlarged, or narrowed, into an estate tail, by a subsequent gift to sons or children living at the death of the tenant for life, or by a gift over in the event of the tenant for life, or in fee, dying without issue living at his death; *Denn* v. *Bagshaw* (*b*); *Gallini* v. *Gallini* (*c*); *Lethewllier* v. *Tracay* (*d*); *Doe* d. *Barnfield* v. *Wetton* (*e*); *Doe* v. *Webber* (*f*); *Doe* v. *Frost* (*g*). An additional circumstance in favor of the construction for which we contend is the gift of portions to *Thomas's* younger children, as was the case in *Doe* v. *Webber* (*f*).

Thirdly. The testator directs, that if *Thomas* should not leave any son at his death, his next brother was to succeed to the *estate* (which word would here again carry the fee), *and so on*, in case of failure of male heirs, to the third, fourth, &c., the eldest great nephew living always (that is on every devolution) being considered as the testator's heir in case of failure of the other brothers. The words "and so on" refer to the previous gift, and shew an intention that the other great nephews were to take estates in fee simple in the same manner as *Thomas*; *Lisle* v. *Gray* (*h*); *Lowe* v. *Davies* (*i*); *Doe* v. *Woodall* (*k*); *Fearne, Cont. Rem.* (*l*). The words "male heirs" must be taken with reference to the context to mean

(*a*) 6 W. R. 397.
(*b*) 6 T. R. 512.
(*c*) 5 B. & Ad. 621, and 3 Ad. & El. 340.
(*d*) 3 Atk. 784.
(*e*) 2 Bur. & P. 324.
(*f*) 1 B. & Ald. 713.
(*g*) 3 B. & Ald. 546.
(*h*) 2 Lev. 223.
(*i*) 2 Ld. Raym. 1561.
(*k*) 16 L. J., N. S., C. B. 28.
(*l*) Page 151.

mean "sons;" *Ryan* v. *Cowley* (*a*); *Carter* v. *Bentall* (*b*); *Goldie* v. *Greaves* (*c*). That the testator so intended, is evident from the expression used by him in the subsequent gift over to *Thomas's* uncles, in case he and his brothers all die without leaving a son or sons. So far, therefore, the will is perfectly clear in favor of the construction for which we contend; but then comes the declaration, which is supposed to shew a general paramount intention, on the part of the testator, that all his nephews should take estates tail:—viz., "My express will and desire being that the estates do always descend in the male line." These words do not, however, shew any such general intention, but are merely referential to the course of devolution which the testator had already pointed out, and which, with its various contingencies, was entirely inconsistent with the devolution of an estate tail. It is true that the testator uses the word "descend," which may be said to import a mode of devolution inconsistent with the construction for which we contend; but it is to be observed, that in the next paragraph of the will, he uses the same term to import devolution from one great nephew to another, which is equally inconsistent with the construction which gives an estate tail. The word "always," which also occurs in this clause, does not appear to be used by the testator in a sense denoting perpetuity or successive descents, any more than in the preceding sentence, where it is applied to the happening of a single event. The doctrine of general and particular intent is commented on by Lord *Denman* in *Doe* v. *Gallini* (*d*), where he says, "The more correct mode of stating the rule of construction is," &c., &c., "and thus explained it should be applied to this and all other wills." He adds,

(*a*) *Lloyd & Go.* 10.
(*b*) 2 *Beav.* 551.
(*c*) 14 *Sim.* 348.
(*d*) 5 *B. & Ad.* 640.

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adds, "Another undoubted rule of construction is," &c., to end of paragraph. In *Grey* v. *Pearson* (*a*), Lord *Wensleydale* observes, "I have been very deeply impressed with the rule," &c. He repeats his remarks in the subsequent case of *Baker* v. *Baker* (*b*). On the whole will, therefore, there is nothing in the declaration or in any other part of the will to warrant the rejection of the clearly expressed contingent dispositions, or to authorize the substitution, in their place, of a regular course of limitations founded on a supposed general intention of the testator, which can only be inferred from ambiguous expressions, and is entirely at variance with the express particular disposition which he has previously made.

Mr. *Shapter* in reply. It is impossible to reconcile all the expressions in the will, if taken literally, but the words "in case of failure of male heirs" of one great nephew then to the other great nephew, and the direction that the estates should *descend* in the male line clearly shew, that estates tail were intended, and that the words "child or children," and "son" meant "issue" and "issue male." The Court is bound to construe limitations to be *remainders*, in preference, if possible, to *executory devises*; *Fearne, Cont. Rem.* (*c*).

May 24. *The* MASTER *of the* ROLLS.

This is a bill to carry into execution the trusts of the will

(*a*) 5 *Weekly Rep.* 460. (*b*) 6 *House Lords Cas. p.* 630.
(*c*) *Page* 393.

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will of the testator named *Thomas Jenkins*, who died at *Rome* in *May*, 1798.

The words of the will are certainly not very easy to construe. The word "son" occurs six times in the first eight paragraphs, and it must be read "issue male," if it is to be made consistent with the word "heir," which occurs in the 6th, 8th, 9th and 10th paragraphs of the will, according to my numbering. On the other hand, in these latter paragraphs, which I have read, the word "heir" occurs four times, and this must be read "son" or "sons," in order to make it consistent with the word "son" or sons," which occurs in the former parts of the will.

In this state of things, it is necessary to look at the rest of the passages to see what is the scope and object of them, always bearing in mind, that the word "son" is quite as flexible as the word heir, and can as easily be read "issue male" as the word "heir" can be turned into the word "son." In the 1st paragraph, in the commencement, the testator appoints his great nephew *Thomas Jenkins* "his universal heir," and he repeats this direction in the 2nd paragraph. This alone would be sufficient to give the estate in fee simple, unless controlled by the subsequent limitation. In the 4th paragraph he directs, that the estates shall descend to the "eldest son" of *Thomas*. Strictly speaking, an estate can only *descend* on the eldest son of *Thomas*, by reason of *Thomas* taking an estate of inheritance. To meet this, it is argued, that the word "descend" cannot have this signification, because it must be considered to mean the same thing throughout his will, and that in another paragraph (No. 10), it is applied to the passing of the estate from one great nephew to another, which cannot be descent. It is true that the 5th paragraph excludes the children of the

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the son of *Thomas*, if the son is treated as a purchaser; but the next following sentence treats this very son as taking by descent, for he declares that he shall be considered as heir to my estates.

But the following paragraphs in the will are, in my opinion, conclusive, that the testator intended the children of the great nephew *Thomas* to take by descent. In the 8th paragraph he says,—"If my godson and great nephew *Thomas* should not leave any son at his death, I then direct that his next brother, and second son of my nephew *William*, succeed to my estate, and so on; in case of failure of male heirs to the third, fourth, &c." Here the testator interprets the "not leaving any son" to mean a failure of heirs male.

An argument was undoubtedly attempted to be rested on the words "and so on," as if they were synonymous with "in like manner," and that thus the former limitations must be introduced. Undoubtedly the words "and so on" are occasionally used in this sense, but this is not their primary meaning. He says, in the 5th paragraph,—"It is always to be understood, that if my great nephew *Thomas* should have more sons than one, if the eldest son should die before his father, he is to be succeeded by his second son, *and so on* to the third, &c." And, in my opinion, in this paragraph, these words are not referential to the mode of taking, but merely descriptive of the order of succession in which the persons are to take.

But what weighs with me most is the 9th paragraph, which I must reject altogether, if I adopt the argument of the Plaintiffs, for it is in these words:—"The eldest great nephew living always is to be considered as my legitimate heir, in case of failure of the other brothers, my

my express will and desire being, that my estates do always descend in the male line." These words "descend in the male line" have a distinct and definite meaning, and are applicable to and give a clue to the general meaning of the testator, which, but for this, is not very clear: with respect to the rest of this part of the will, it is true, that in the 10th paragraph the testator speaks of the estate "descending from one great nephew to another," but even in this paragraph he inferentially points out, that the sum to be raised in favor of females is only to take effect in case their father "die without heir male," thereby pointing out that the word "child," in the 7th paragraph, is to be read synonymously with the word "issue."

The 11th and last paragraph is very confused. He still talks of the heirs of the nephew *Joseph* taking, in case of failure of the sons or son of his nephew *William*, using the words "sons" and "heirs" almost as synonymous, and certainly indiscriminately throughout this paragraph. From this paragraph, had it stood alone, it would have been difficult to have extracted any meaning conclusively, one way or the other, but the inclination of my mind is, that this paragraph, standing alone, would have tended to shew the testator used the word "heir" and "heirs male" in the sense of *son*. I cannot, however, get over the positive declaration of his "express will and desire" in the 9th paragraph, that the estates are to descend in the male line, coupled with the explanation which he gives in the 10th paragraph of his desire, and which afford, as it were, a key to his meaning throughout.

What he meant may, I think, be very shortly and clearly expressed in these words,—"I desire my real estates to go in the same manner as if my father had died

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died seised of them in tail male," and that this was the scheme of the will, and this the mode in which he intended the whole of it should operate, and in order to accomplish that end, that the entail, so as it were vested in his father, should not be barred.

It is, on the perusal of the will alone, that I have come to this conclusion, uninfluenced by the decision in the case of *Jenkins* v. *Herries* (*a*). It is to be observed, however, that this was a direct decision on this very will, which has not been reversed; and that besides this, it speaks of a decision to the same effect by a Court of Common Law, in a case sent for the opinion of that Court. It is true, that the decision at law is deprived of much of its value, by the fact, that it seems probable that the case was a concerted one, and that probably both sides covertly concurred in endeavouring to obtain the decision actually pronounced by that Court. The case, however, before the Vice-Chancellor was *bonâ fide* contested; the decision was appealed to the House of Lords, where it certainly met with a singular result, for that Court declined to entertain the appeal till it should appear that the Court below acted on its own decision, which result was a mere formal matter of course. Still, the fact of the House of Lords having adopted that course points very strongly to the inference, that the House of Lords would not have supported the decision of the Court below; and it appears that this was so considered by the parties, inasmuch as the matter seems to have been compromised and the purchase abandoned. But even if the House of Lords had reversed the decision of the Vice-Chancellor, it would not have decided that the construction put on this will by the Vice-Chancellor was erroneous. It would merely have decided that the question was one involving

(*a*) 4 *Maddock*, 67.

involving too much doubt to enable the Court to compel a purchaser to take a title depending on such a question, in the absence of the person who alone was really interested in contesting it. The decision in *Maddock* therefore certainly does not bind me; but for the reasons I have stated, drawn from the general scope and object of the devise, and the interpretation of the devise itself, given by the testator in his own will, I think that all the estates given in the property of the testator included in this devise were estates in tail male, and that consequently, upon the statements contained in the bill, the Plaintiff has no title to the relief which he asks, and the demurrer must be allowed.

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NOTE.—An appeal to the House of Lords is pending.

THRUPP *v.* COLLETT. (No. 1.)

July 26.

THE testator, *John Collett*, by his will dated in 1849, bequeathed to his executors as follows:—"To my executors the sum of 5,000*l.* sterling, which I direct they will, within the period of five years from my decease, pay and apply *in purchasing and procuring the discharges of persons*, who, at the time of my decease or at any time during the said period of five years, shall or may be *committed to prison, for non-payment of fines, fees or expenses, under the game laws* now or to be hereafter in force, the cases to be selected by my executors, in their own discretion and judgment; but no payment for procuring the discharge of any one person to exceed the sum of nineteen guineas. And all such portions of the said sum of 5,000*l.*, or interest to arise therefrom, as my executors shall not have so paid and applied within the period of five years from my decease, or which

Bequest for purchasing the discharge of poachers, "committed to prison for non-payment of fines, fees or expenses under the Game Laws," *Held* void as encouraging offences and opposed to public policy.

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which it might be considered could not be legally paid or applied for such purposes, or either of them, by reason of the said bequest being wholly or in part void, shall be laid out by my executors in the purchase of an annuity or annuities for the lives of my said wife and daughter and the life of the survivor, and for their and her benefit, in the same way as the general residue of my estate is directed to be invested and applied, and as if the same were part thereof. But nevertheless my executors shall not be charged with or accountable for any payment or appropriation of the said sum of 5,000*l.* and interest, or any part thereof, by reason of any illegality or supposed illegality of the bequest thereof, hereinbefore contained, or of its being considered in whole or in part void, if they my said executors shall obtain the sanction and consent in writing of my wife and daughter, or the survivor of them, to any payment they may in their discretion make; and, after obtaining such sanction and consent in writing, my executors shall be discharged from all liability, claim and demand in respect thereof, as well from my said wife and daughter, or either of them, as from any person or persons whomsoever; and notwithstanding anything that may be urged against the validity of the bequest above contained, or any part thereof, I rely on my wife and daughter concurring in carrying my wishes into effect."

The testator died in 1856.

The Defendants *Ermingarde Collett*, *Adam Atkinson* and *Charlotte Eustatia* his wife contended and insisted, that the bequest of the legacy of 5,000*l.* to the executors, to be paid and applied in purchasing and procuring the discharge of persons committed to prison for non-payment of fines, fees or expenses under the game laws, was illegal and void, and that it formed part of the

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the residuary estate of the testator, and ought to be invested in the purchase of an annuity or annuities as directed by the will in respect of the testator's residuary estate.

Mr. *Piggott* for the executors.

Mr. *Wickens*, in support of the bequest. The charity is not illegal, for one of the charitable objects mentioned in the Statute of Charitable Uses (43 *Eliz.* c. 4) is "for relief or redemption of prisoners or captives." If there be two charitable purposes, one of which is good, and the other bad, the valid alternative will prevent the gift from failing; *Sorresby* v. *Hollins* (*a*). Here, if the trustees cannot apply the fund in payment of "fines," still they may pay "the fees and expenses."

Again, if the gift be charitable, but the mode of applying it be illegal, the fund must be applied as the Crown by sign manual may direct; *Da Costa* v. *De Pas* (*b*); and if the Court is unable to exercise the discretion, *Forbes* v. *Forbes* (*c*), the fund is divisible amongst the three objects equally; *Brown* v. *Higgs* (*d*).

Mr. *Lloyd*, for the residuary legatees, was not called on.

The MASTER *of the* ROLLS.

I cannot support this bequest. It is impossible not to see, that the effect of it would be to give immunity and protect persons in the commission of acts, which are treated by the legislature as offences, and for which penalties

(*a*) 9 *Mod.* 221.
(*b*) *Ambler*, 228.
(*c*) 18 *Beav.* 552.
(*d*) 8 *Ves.* 561.

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penalties by fine are imposed. This Court could not support a charity which would protect persons from the consequences of this offence, any more than of others of a different nature, which might even amount to felony.

Looking at this bequest in a plain common-sense view, it is obviously calculated to encourage offences prohibited by the legislature. This is against public policy, and the Court cannot carry such an object into effect.

Declare it void.

WEBSTER *v.* BODDINGTON.

July 22, 28.

A testator gave his residuary estate to his daughter for life, and afterwards to her two sons *Henry* and *Charles*, and all other her children thereafter to be born, and the issue of his grandchildren, who, being a son, should attain twenty-one, or being a daughter, should attain that age or marry with consent, equally to be divided, such issue to take a parent's share: *Held* void for remoteness.

THE testator, *Samuel Boddington*, of the city of *London*, merchant, the father of the Defendant, Lady *Webster*, by his will made in 1838, devised and bequeathed his real and personal estate to three trustees, upon trust to sell and realize, and to invest and stand possessed of the stocks and securities, "upon trust during the life of my daughter *Grace Webster* (if they the said trustees or trustee, and when and as soon and at such time or times, as they or he do and shall, in their or his sole and uncontrolled and unaccountable discretion, think fit), in the first place to set apart and appropriate, out of the said dividends, interest and annual proceeds, so much and such part or parts thereof as they the said trustees or trustee shall determine and think proper, and to apply the same for and towards the education and maintenance, or otherwise for the support and benefit of my two grandsons *Henry Boddington Webster* and *Charles Fox Webster*, the sons of my daughter *Grace Webster*, and for all and every other her children or child, if such there shall be, and their issue respectively,

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tively, and whether such grandchildren or issue respectively be minors under the age of twenty-one years or not, but so as that not more than the clear sum of 400*l.* of lawful money of *Great Britain* be so appropriated or applied for each such grandchild or issue in any one year;" and, subject thereto, upon trust, during the natural life of Lady *Webster*, to pay the dividends, interest and annual proceeds to Lady *Webster* for her sole and separate use, without power of anticipation.

And from and after her decease, "upon trust for my said two grandchildren *Henry Boddington Webster* and *Charles Fox Webster*, and all and every other the child or children of my said daughter *Grace Webster* hereafter to be born, if any, and whether of her present or any future marriage or marriages, or the issue of such grandsons respectively, or other child or children, in such parts, shares and proportions, and subject to such conditions, restrictions and limitations over, such limitations over to be for the benefit of some or one of the said grandsons and other children or issue, as my said daughter *Grace Webster* (but always with the approbation of the said trustees or trustee for the time being of this my will, signified in writing under their or his hands or hand) shall, notwithstanding her coverture, by any deed or deeds, or other instrument in writing, with or without power of revocation, to be by her sealed and delivered in the presence of and attested by two or more witnesses, or by her last will and testament in writing, or any codicil or codicils thereto, or any other testamentary writing, to be signed by her in the presence of and to be attested by the like number of witnesses, shall direct or appoint. And in default of any such direction or appointment, then *in trust for all* and every my said *grandsons* and other the child and children of my said daughter *Grace Webster* hereafter to be born (if any), and whether of her present or any future

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marriage or marriages, *and the issue of such grandsons* or other child or children, *who being a son or sons shall live to attain the age of twenty-one years*, or being a daughter or daughters shall live to attain that age, or be married under that age with the previous consent of my said daughter (if living), equally to be divided between or amongst them (if more than one) share and share alike, such issue taking a parent's share."

"Provided nevertheless, and I declare and direct, that if there shall not be any children or child or other issue of my said daughter, who, being a son, shall live to attain the age of twenty-one years, or, being a daughter, shall live to attain that age or be married with such previous consent given thereto as aforesaid, then and in such case, from and after the decease of my said daughter *Grace Webster*, in case she shall be then living and shall have survived her said husband the said *Henry Webster*, upon trust, as to the further sum of 10,000*l.*," to be raised out of his trust estate, to such persons as Lady *Webster* should appoint, and subject thereto he gave the trust premises to his brother *Thomas Boddington* for life, and afterwards to his nephew *Thomas Boddington*, the younger, absolutely.

There was a power of maintenance during the minority "of my said grandsons or other children or issue, for the time being immediately entitled by virtue of this my will, in expectancy, to the said trust monies."

There was also a power of advancement during the minority "of my said grandsons and other the children or other issue for the time being immediately entitled, by virtue of this my will, in expectancy, to the said several trust monies."

The testator died in 1843; his daughter survived him. Her husband Sir *Henry Webster* died in 1847. She

She had two children only, *Henry Boddington Webster* and *Charles Fox Webster*, mentioned in the will, both of whom had now attained twenty-one.

In 1853, Lady *Webster* released her power of appointment.

This suit was instituted by Lady *Webster* and her two sons, and the question argued was as to the validity of the limitation, in the will, to *Henry B. Webster* and *Charles F. Webster* and their issue, it being alleged to be void for remoteness. The case was originally heard on the 31st of *May*, 1854, when the Master of the Rolls held the discretionary power of maintenance of the grandchildren and issue, "during the life of Lady *Webster*," was valid; but he declined deciding the question as to remoteness until issue had been born, who might support the validity of the bequest.

A child having been born to *Charles Fox Webster*, the cause now came on for argument.

Mr. *R. Palmer* and Mr. *Loudon* for the Plaintiffs. The limitation to the testator's two grandsons and other the children of his daughter, and the issue of such grandson who should attain twenty-one, is void. Neither the children or the issue take vested interests unless they attain twenty-one, or attain that age or marry. The words are, who "shall live to attain," which apply to both. The issue may not attain twenty-one within a life in being or twenty-one years afterwards, and the gift to some of the class being too remote, the whole fails, for they cannot be separated; *Greenwood* v. *Roberts* (*a*); *Gooch* v. *Gooch* (*b*); *Seaman* v. *Wood* (*c*); *Read* v. *Gooding* (*d*).

Mr.

(*a*) 15 *Beav.* 92.
(*b*) 14 *Beav.* 565; 3 *De Gex, M. & G.* 366.
(*c*) 22 *Beav.* 591.
(*d*) 21 *Beav.* 478.

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Mr. *Bristowe* in the same interest. The word "issue" is equivalent to children, so there would be a gift to great grandchildren at twenty-one; *Wild's Case* (*a*).

If the two grandsons had died under age, leaving children, who also died under age, the third generation attaining twenty-one were intended to take, which is plainly void.

Mr. *Hobhouse* in the same interest.

Mr. *Busk* for the wife of *Charles Fox Webster*.

Mr. *Selwyn* and Mr. *Rendall* for a child of *Charles F. Webster*, and Mr. *Lloyd* and Mr. *Freeling* for the trustees and the parties taking in remainder, in support of the validity of the gift.

The power of maintenance in favor of the grandchildren and their *issue* has been held valid; the presumption, therefore, is, that the issue to take the corpus of the property are the same, and, if so, the subsequent gift to them is valid.

The period for ascertaining the class is the death of the tenant for life; and if you can ascertain the shares into which the whole is to be divided within the proper limits as to time, the subsequent limitations, though too remote, only affect those severed shares to which they are applicable. Here, the class is the grandchildren; the issue who are to take "a parent's share" are not members of the original class, but take by substitution for their parents; *Pearson* v. *Stephen* (*b*). The word "parent" limits the issue to children; *Ross* v. *Ross* (*c*); *Robinson* v. *Sykes* (*d*).

The

(*a*) 6 *Rep.* 17.
(*b*) 5 *Bligh*, 203.
(*c*) 20 *Beav.* 645.
(*d*) 23 *Beav.* 40.

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The gift to the grandchildren at twenty-one is valid; and even if the substitutionary gift to the issue be void, the first gift remains unaffected by it.

The grandchildren who attain twenty-one take vested interests, subject to be divested by death in the life of the tenant for life, and then their children take the severed shares by substitution.

James v. *Lord Wynford* (*a*); *Griffith* v. *Pownall* (*b*); were also referred to.

Mr. *Loudon*, in reply, referred to *Dick* v. *Lacy* (*c*).

The MASTER *of the* ROLLS.

July 28.

The question arising upon the construction of the will of Mr. *Boddington* is, whether a limitation is too remote. He gives the property in question upon trust for his grandchildren or their issue as his daughter shall appoint.

I only refer to that power for the purpose of saying that it was perfectly good, but that as Lady *Webster* has released all her right of appointment, no question arises upon that part of the case.

The will then proceeds to state what is to be done in default of appointment, and upon that the question arises. The testator says, "And in default of any such direction or appointment, then in trust for all and every my said grandsons, and other the child and children of my

(*a*) 1 *Smale & G.* 40.
(*b*) 13 *Sim.* 393.
(*c*) 8 *Beav.* 214.

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my said daughter *Grace Webster*, hereafter to be born (if any), and whether of her present or any future marriage or marriages, and the issue of such grandsons or other child or children, who, being a son or sons, shall live to attain the age of twenty-one years, or, being a daughter or daughters, shall live to attain that age, or be married under that age, with the previous consent of my said daughter (if living), equally to be divided between or amongst them (if more than one), share and share alike, such issue taking a parent's share."

The question arises upon those words, and really is this:—when is the class to be ascertained? whether immediately on the death of the daughter, in which case the gift is perfectly good; or whether it is to be ascertained when the grandchildren or issue of a grandchild have attained the age of twenty-one years.

If, on the death of Lady *Webster*, the estate is to be divided into as many shares as there are children of Lady *Webster* who survive her, and children of Lady *Webster* who have predeceased her leaving children, then it is perfectly good; but if it be necessary to wait until either all the children of Lady *Webster* shall have attained twenty-one, or until some child or remoter issue of a child of Lady *Webster* shall have attained twenty-one after her decease, in order to ascertain the number of shares into which the estate is to be divided, then it is void for remoteness, as the class to take is not to be ascertained until after a period which may exceed a life or lives in being and twenty-one years afterwards. If Lady *Webster* should die, leaving an infant daughter, who should also die in infancy, leaving a child, would that child be entitled under the words of the will (assuming no rule against perpetuity existed) to take his share in this property? On the best consideration

deration I can give to the case, I think that these words which I have already read, "who being a son or sons shall live to attain the age of twenty-one years, or being a daughter or daughters shall live to attain that age or be married under that age with the previous consent of my said daughter, if living," apply both to the living grandsons and to the other children of the testator's daughter as well as to the issue of the grandchildren, that the words are not confined to the issue of the grandchildren, but apply to the whole class, and that the class consists of three sets of persons, viz., the existing grandsons who are named, grandchildren thereafter to be born, and the issue of those two previous descriptions of grandchildren who may have died before the period of distribution, all of whom must attain twenty-one years before the division of the fund takes place.

I have carefully considered the authorities which were cited to me, and I have reconsidered my decision in the case of *Greenwood* v. *Roberts* (*a*), the more so as that case, if correct, seems to me to govern the present one, and as it has undergone some discussion since in a very learned work on this subject (*b*), and has been supposed to be inconsistent with the decision of Sir *Lancelot Shadwell* in *Griffith* v. *Pownall* (*c*). But upon the best consideration I can give to the case it appears to me quite consistent with *Griffith* v. *Pownall*, and to govern the present case.

In *Griffith* v. *Pownall* there was a power to appoint a fund amongst all the children of a named person, begotten and to be begotten, and their issue, and in default

(*a*) 15 *Beav.* 92.
(*b*) 1 *Jarman on Wills, p.* 226, *2nd ed.*
(*c*) 13 *Sim.* 393.

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default of appointment it was given to the children equally. The donee of the power had six children, all of whom were alive when the power was created, and the appointor had directed, by his will, that the share which every child of the donee begotten or to be begotten was entitled to in default of appointment should be held in trust for that child for life, and after his death for his children. The donee of the power appointed the fund among many objects, which were perfectly good at the time. It was held that the appointment was perfectly good with respect to all those children, because it was a separate and distinct matter and could be kept separate and distinct, and that therefore the appointment was good to the extent to which it was within the limits of perpetuity, but bad to the extent that it went beyond it.

I not only approve of that decision, but think it is quite consistent with my decision in *Greenwood* v. *Roberts* (*a*).

In *Greenwood* v. *Roberts* the gift was to the children of *Thomas* living at his decease, in equal shares and proportions, and there was this direction contained in the will. "And I further direct, that if any of the children of my brother *Thomas* shall, at his decease, be dead and have left issue, such issue shall nevertheless be entitled among them, if more than one, to the same sum of money as they would eventually have been entitled to had their parent outlived them." Now the validity of the bequest there could not depend upon the fact whether the children of *Thomas* who were alive at the date of the will survived *Thomas* or not, and if they all died l aving children, the children would have to share

(*a*) 15 *Beav.* 92.

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share with the other children of *Thomas* who were born after the death of testator, but had predeceased *Thomas*, and this would, undoubtedly, have been good if the class were to be ascertained at the death of *Thomas*, but they took no vested interests until they attained twenty-one, so that if the children of *Thomas* who were living at the date of the will died before *Thomas* and left children, who died under twenty-one years leaving remoter issue, it would not be until these remoter issue attained twenty-one that the class would be ascertained, or the number of shares ascertained into which the fund would be divisible. If at *Thomas's* death he had no child living, but all his children had died leaving issue and were all infants, and they could not take until twenty-one, they might again have died leaving remoter issue, who would not take until twenty-one, so that, in point of fact, the class was not to be ascertained until a period beyond a life and lives in being and twenty-one years afterwards.

In *Cattlin* v. *Brown* (*a*), Vice-Chancellor *Wood* has very carefully considered this case; he takes the distinction which I have already stated, and expresses his approbation of that case. The case there was simply this:—It was "a devise to *Thomas Cattlin* for life, with remainder to all and every the children of *Thomas Catlin* during their natural lives, in equal shares, and after the decease of any or either of them, the part or share of the child so dying unto his, her or their children or child, and his, her or their heirs for ever, as tenants in common." The Vice-Chancellor there held, that they were distinct and separate gifts, and that therefore those that were given to the children of *Thomas Catlin*, who were alive at the death of the testator, would

(*a*) 11 *Hare*, 372.

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would be perfectly good. I fully acquiesce in the propriety of that decision, and I fully concur in the five rules which he lays down in that case, in which he specifies what are the leading principles which govern these cases. I think it necessary to refer to the fifth rule which he mentions in page 377, because, if this case does not come within that rule, it must be too remote. The Vice-Chancellor says, "The fifth and last rule to which I need to advert is this:—that where there is a gift or devise of a given sum of money or property to each member of a class, and the gift to each is wholly independent of the same or similar gift to every other member of the class, and cannot be augmented or diminished, whatever be the number of the other members, then the gift may be good as to those within the limits allowed by law." I fully concur in these expressions, and the case of *Griffith* v. *Pownall* (*a*) is brought within the principle of the rule by the gift of a power to a person who might select objects who were not beyond the proper limits.

But I think that the present case cannot be brought within that rule. If I am right, that the direction as to the attainment of twenty-one years is essential to enable any member of the class to take, it is obvious, on the face of the will, that there is this very possible result, viz., that before the decease of Lady *Webster* the grandchildren then alive might all have died leaving children or remoter issue, that some of her children might also have been born to Lady *Webster* after the death of the testator, that all these might have predeceased her and left children under twenty-one, and that all these might have been infants at the death of Lady *Webster*. The class could not then be ascertained, for no one would have attained the age when it was to vest, and it was not to be divided until some member of the class had attained the

(*a*) 13 *Sim.* 309.

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the age of twenty-one years after her decease, and it is not by any means clear, that this event would take place within twenty-one years after her decease, because the infant child or issue of Lady *Webster*, then alive, might have died in their infancy, leaving children or remoter issue who would not have attained twenty-one, and therefore would not have attained vested interests until more than twenty-one years after the death of Lady *Webster*. It is manifest in this case, as I observed with reference to the case of *Greenwood* v. *Roberts*, that the validity of the testamentary disposition cannot depend on the fact whether the grandchildren who were alive at the date of the will survived Lady *Webster* or not. It would be contrary to every principle to allow subsequent events which have occurred to determine the validity of a devise or bequest. It is obvious that it must be good or bad in its inception, and as soon as the will takes effect, viz., on the death of the testator, it takes effect and is a good disposition or not, either in whole or in part; but the number of the class to be ascertained, as they may die leaving children or remoter issue, could not be ascertained until after the death of Lady *Webster*, nor until it had been ascertained that some of the issue of the class had attained the age of twenty-one years.

I am, therefore, of opinion, upon the best consideration that I can give to this will, that the existing grandsons formed only a portion of a class, which was not to be ascertained until a period which, by possibility, might exceed the life of Lady *Webster* and twenty-one years after her decease, and, therefore, I think, that the gift to them is too remote.

1858.

CHRISTY *v.* COURTENAY.

Feb. 8.

Voluntary gift of leaseholds by a father to his sons, in 1835 and 1841, set aside, it being ascertained, on a reference, that at those periods the settlor's debts exceeded his assets.

Surplus produce of the sale, under the Court, of leaseholds for lives mortgaged by the testator, held legal, and not equitable, assets.

THIS case is reported *ante* (*a*), on which occasion Lord *Langdale* directed a reference, in order to ascertain whether the testator was solvent at the time he made the voluntary settlements on his sons in 1835 and 1841.

Part of the testator's estate, consisting of chambers in the *Temple*, held for lives. These were in 1836 mortgaged to Messrs. *Milne* for 8,000*l.*

By the decree, the chambers were ordered to be sold, free from the mortgages, in case the mortgagees consented, and the surplus of the produce, after paying the mortgagees, was ordered to be paid into Court, and "that the question whether such proceeds of sale constitute legal or equitable assets be reserved."

The chambers were accordingly sold, and the mortgagees having been fully paid, the surplus produce was paid into Court, and carried to a separate account, intituled "The proceeds of disputed Chambers' Account."

The Master made his report, by which he found, that the saleable value of the testator's property on the 1st day of *May*, 1835 (other than the chambers which were transferred into the joint names of his sons *Philip Warner Courtenay* and *Francis Foljambe Courtenay* on the 1st day of *May*, 1835), was 54,833*l.* 19*s.* 9*d.*, and the amount of the debts and liabilities of the testator, on the same day, was 57,505*l.* 1*s.* 9*d.*, leaving the testator indebted in the sum of 2,671*l.* 2*s.* beyond the value

(*a*) 13 *Beav.* 96.

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value of his property; and that 1,848*l.* 15*s.* (part of the value of the testator's estate on the 1st day of *May*, 1835) represented the value of shares in mining companies, which shares were liable to fluctuation and might become wholly valueless.

And he found, that the saleable value of the testator's property on the 29th of *January*, 1841 (other than the chambers transferred into the names of his sons *Philip Warner Courtenay* and *Francis Foljambe Courtenay* on the 1st day of *May*, 1835, and 29th of *January*, 1841), was 54,611*l.* 13*s.* 7*d.* or thereabouts, and the amount of the debts and liabilities of the testator on the same day was 75,506*l.* 9*s.* 10*d.*, leaving a sum of 20,894*l.* 16*s.* 3*d.* due from the testator beyond the value of his assets; and that 1,251*l.*, part of the value of the testator's estate on the 29th day of *January*, 1841, was the value of shares in mining companies, which shares were liable to fluctuation and might become wholly valueless.

And he found, that the estimated value of the chambers transferred into the names of his sons *Philip Warner Courtenay* and *Francis Foljambe Courtenay* on the 1st day of *May*, 1835, according to the books of the said testator (*a*), was 6,941*l.*

And he further found, that the estimated value of the chambers transferred into the names of *Philip Warner Courtenay* and *Francis Foljambe Courtenay* on the 29th day of *January*, 1841, including the right of transfer which was then exercised in favor of *Philip Warner Courtenay* (which the testator valued at 1,950*l.*), was 6,191*l.*

The

(*a*) In these books, the testator estimated the value of chambers held by him, in 1840, at nominal rents, of the *Inner Temple*, of which he was a Bencher, at 29,527*l.*

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The testator's specialty debts were 16,528*l.*, and his simple contract debts 18,029*l.*, and the Master found, that, by the order dated the 18th day of *March*, 1850, it was ordered, that the question whether the proceeds of sale which might be carried to the account entitled "Proceeds of disputed Chambers' Account," constituted legal or equitable assets should be reserved.

The Master therefore found, that until it had been decided what fund, if any, was to be considered equitable assets, there was no fund applicable to the payment of the simple contract creditors of the testator.

The cause now came on for further consideration.

Mr. *Greene*, for the Plaintiffs, now contended that the surplus produce of the sales formed equitable assets, and was divisible *pari passu* amongst the specialty and simple contract creditors.

Mr. *Selwyn*, *contrà*.

Rakestraw v. *Brewer* (*a*); *Cunningham* v. *Wegy* (*b*); *Price* v. *North* (*c*); *Silk* v. *Prime* (*d*), were cited; and see *Cook* v. *Greyson* (*e*); *Shee* v. *French* (*f*).

The MASTER *of the* ROLLS declared, that the transfers made by Mr. *Courtenay* to his sons, in 1835 and 1841, were void under the Statute. He held that the surplus produce of the chambers formed part of the legal assets of the testator, and directed the Plaintiffs' costs to be paid out of the funds, and the residue to be apportioned amongst the specialty creditors.

(*a*) 2 *P. Wms.* 511.
(*b*) 2 *Bro. C. C.* 241.
(*c*) 1 *Phil.* 85.
(*d*) 1 *Bro. C. C.* 138.
(*e*) 3 *Drew.* 547.
(*f*) *Ibid.* 716.

NOTE.—*Reg. Lib.* 1857, *A. fol.* 741.

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MUIR *v.* JOLLY.

June 5.

A trustee purchased an estate on behalf of the trust. The vendor executed a conveyance to the trustee, which recited the trust, and that the trustee had called in trust monies sufficient to pay the purchase money, and it contained a receipt for the whole purchase money. In fact, only part was paid, and the trustee gave his bond and a memorandum of deposit for the deficiency, the latter reciting that the vendor had lent the trustee that sum to enable him to complete: *Held*, that the vendor had no lien on the title-deeds in his possession for the unpaid purchase money.

IN 1811, on the marriage of *Joseph S. Muir* and his wife, two legacies of 100*l.* and 200*l.*, a sum of 50*l.* due from *Jackson*, and 150*l.* due on the promissory note of *Dale*, were assigned to *Jackson* and *Dale* upon trust for Mrs. *Muir* for life, and afterwards for the children of the marriage. The trustees were authorized to invest all or any part of the trust funds in freeholds.

There were five children of the marriage. In 1843, *Dale* entered into negotiations with *Jolly* for the purchase of a freehold house and garden, and by an indenture dated in 1843, made by *Jolly* and others of the one part, and *Dale* (described as the only acting trustee of the settlement) of the other, after reciting the marriage settlement, and that *Dale* had, at the request of *Muir* and wife, contracted with *Jolly* for the purchase of the property for 370*l.*, and that *Dale*, for the purpose of enabling him to pay the purchase money, had called in and *obtained payment of a sufficient part of the trust monies* which were vested in him upon the trusts of the said settlement, it was witnessed, that in consideration of 370*l.* in full for the said purchase money to *Jolly*, paid by *Dale*, *by and out of the said trust monies gotten in and received by him* as the acting trustee (the receipt whereof *Jolly* thereby acknowledged), the property was conveyed to *Dale*, his heirs and assigns, upon the trusts of the indenture of settlement of the 5th day of *December*, 1811.

A receipt for the 370*l.* was indorsed on the conveyance, and signed by *Jolly* the vendor, but, in fact, 200*l.* only were paid to *Jolly*, and the 170*l.* had never been paid.

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paid. *Dale*, however, executed a bond, dated the 22nd day of *April*, 1843, for securing to *Jolly* the payment of the sum of 170*l.* and interest on the 22nd day of *October* then next. He also signed a memorandum of the same date, which was to the following effect:—It recited that *Jolly* had that day advanced and lent to *Dale* 170*l*, in order to enable him, as a trustee under the marriage settlement of *Muir* and wife, to complete the purchase of a certain freehold, &c. purchased by *Dale* as such trustee as aforesaid; and that, as a further consideration and inducement to *Jolly* for making the loan, *Dale* had, on that day, delivered unto and deposited with *Jolly* the title-deeds and writings of the property. It then witnessed and *Dale* thereby declared, that the deeds had been deposited by him with *Jolly* as a pledge for better securing to him the payment of 170*l.* and interest. And *Dale* agreed to execute all deeds necessary for conveying the property to *Jolly*, by way of mortgage, for securing the 170*l.* and interest.

Jolly retained possession of the purchase and title-deeds, and after his death, this suit was instituted against his representatives by a child of the marriage, insisting that *Jolly* was not an equitable mortgagee of the property, inasmuch as *Dale* had no right or power to make such deposit or to sign or execute such memorandum, and that the same were null and void as against the Plaintiff and the other parties beneficially interested in the property. The bill prayed a declaration that the representatives of *Jolly* were not entitled to any mortgage or lien upon the premises or the title-deeds, and that they might be delivered up. It alleged that *Jolly* well knew that the premises were purchased with trust money, and it was his duty, therefore, to have required the immediate payment thereof by *Dale*, who had then in his hands trust monies amply sufficient for the

the purpose; and that if *Jolly* permitted any part of the purchase money to remain unpaid, he did so by arrangement between himself and *Dale*, and for the convenience of one or both of them.

The Defendants, by their answer, declined to give up the deeds, except on payment of the 170*l.* unpaid purchase money and interest.

Mr. *R. Palmer* and Mr. *Sheffield* for the Plaintiff, relied on *White* v. *Wakefield* (*a*).

Mr. *Giffard* in the same interest.

Mr. *Selwyn* and Mr. *Foster*, *contrà*, argued, that it being clearly proved that the whole of the purchase money had not been paid, the vendor, on the established principles of this Court, retained a lien for it, which he had not waived by the securities on the estate. As to the incompetency of the vendor to contradict the recitals of payment of the trust funds, they said it was the ordinary case, for, in all instances of lien for unpaid purchase money, the vendor had been permitted to contradict the recitals of payment and the receipt for the purchase money; *Sug. Vend.* (*b*). They argued, that it was contrary to the plainest principles of equity to allow purchasers, whether trustees or *cestuis que trust*, to obtain an estate without fully paying the consideration for it.

The MASTER *of the* ROLLS.

I am of opinion that the Plaintiff is entitled to a decree. The only question is, whether the sum of 170*l.* is unpaid purchase money or a loan. If it be the former,

(*a*) 7 *Sim.* 401.

(*b*) *Page* 552.

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former, the vendor undoubtedly is entitled to a lien for it, but if the vendor made a loan to the trustee, to enable him to complete the purchase, and took a mortgage of the trust estate, then I am of opinion that he is entitled only to such lien as the person who created it had the power of giving. Mr. *Selwyn* suggested the case of an ordinary purchaser, but in that case the question could not arise, because, whether the vendor had his ordinary lien or a mortgage, the charge on the estate would be the same. If *Jolly*, the vendor, lent this money to *Dale* to enable him to complete, it would be impossible that *Jolly* could say he had any charge or interest on the estate except such as *Dale* could give him.

The real question, therefore, is, whether this sum of 170*l.* is unpaid purchase money or a loan? Does it lie in the mouth of *Jolly* to say that it is unpaid purchase money? The purchase deed recites that *Dale* had "called in and obtained payment of a sufficient part of the trust money;" *Jolly* therefore knew that it was impossible for *Dale* to contradict that assertion. What does *Jolly* do? First, he takes a bond for the payment of the 170*l.* That, however, is not the material part of the transaction, there is this, which is infinitely more important, I mean the memorandum which clearly explains under what circumstances the title deeds remain in the possession of *Jolly*. It is in these words: "Whereas, &c. (*a*)." That is the document which *Jolly* requires as a security for the 170*l.* The recital is not that *Jolly* as vendor had not received the whole purchase money, but that he had advanced the 170*l.* to *Dale* to enable him to complete the purchase on behalf of the trust. How is it possible, after this, for *Jolly* to say that this is a case of unpaid purchase money? it is

(*a*) *See ante, p.* 144.

is inconsistent with the written documents and the character of the transaction. The document admits the receipt of the whole purchase money, this by itself I should regard as nothing, but, coupling it with the other declarations, I think it impossible to treat this as an ordinary case of a purchase by one on his own account. The facts take it out of the ordinary rule and raise this question:—whether *Jolly* is entitled, not as against *Dale* (for as against him he is entitled to every security he could give), but as against the *cestuis que trust*, to retain the title deeds. I am of opinion that he is not, and there must be a decree to deliver up the deeds to the new trustees of the settlement, with costs up to and including the hearing.

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THRUPP *v.* COLLETT. (No. 2.)

July 26.

THE testator by his will, dated in *February*, 1849, after giving a legacy of 500*l.* to *James King*, if in his service at his decease, gave to his executors, to be equally divided between all the other servants in his service at the time of his decease, the sum of 1,000*l.*

There were eight servants who were boarded and lodged on the premises occupied by the testator, and they claimed the legacy. Besides these, *William Coles*, the gardener, *William Clarke*, the under-gardener, and *Joseph Wearn*, an errand boy, as servants of the testator, in his service at the time of his decease, claimed to be entitled, together with the other servants, to participate in the legacy of 1,000*l.*

Under a bequest to the testator's "servants in his service at the time of his decease," the Court *held*, that two out-door servants, continuously employed at weekly wages, were entitled, but that a boy, employed a few months in the year, whilst the testator was at his country residence, at weekly wages, to carry letters to the post, and who was so employed at the testator's death, was not entitled.

The

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The evidence, so far as relates to these three claimants, was as follows:—*William Coles* and *William Clarke* were in the service of the testator at the time of his decease and for a period of about twelve months previously at weekly wages, living off the premises. They were employed during the whole of each working day in the week, and *William Coles* generally, and *William Clarke* occasionally, attended on a part of each *Sunday* to feed the cattle, and they had no other employment from any other person.

Joseph Wearn, aged fourteen or thereabouts, was the son of a day labourer in the neighbourhood, and was employed by the testator, while at *Arnewood* (his country residence), in the month of *June*, 1855, to carry letters and papers to and from the post office while the testator was resident at *Arnewood*, and received 5*s.* 9*d.* per week during such service. *Joseph Wearn* was so employed from *June* to *November* in the year 1855, and from *June*, 1856, until the death of the testator (28th *November*, 1856), but when the testator was absent from *Arnewood*, *Joseph Wearn* was not employed by him.

Mr. *Bagshawe*, for *Coles* and *Clarke*, referred to and commented on the cases of *Chilcot* v. *Bromley* (*a*), where a coachman, provided by a job-master, was held by Sir *W. Grant* not to be a servant living with him at his death; *Bulling* v. *Ellice* (*b*), in which a farm bailiff had been held to be a "servant;" *Ogle* v. *Morgan* (*c*), where the head gardener, living in one of the testator's cottages, and was not dieted by the testator, was held not to be a "servant in my *domestic* establishment," and *Blackwell* v. *Pennant* (*d*), where a bequest to "servants living with me," was held not to exclude servants living in

(*a*) 12 *Ves.* 114.
(*b*) 9 *Jur.* 936.
(*c*) 1 *De Gex, M. & G.* 359.
(*d*) 9 *Hare*, 551.

in a different house; *Howard* v. *Wilson* (*a*); *Townshend* v. *Windham* (*b*), in which case the bequest was, unto "such of my servants as shall be living with me at the time of my death." The Lord Keeper said "the steward of courts, and such who are not obliged to spend their whole time with their master, but may also serve any other master, are not servants within the intention of the will, but I will not narrow it to such servants only that lived in the testator's house, or had diet from him."

Mr. *Swanston*, jun., for the boy *Wearn*, argued, that he was a servant, and had lost his situation by the death of the testator, and that it was the intention of the testator to make some compensation to persons in his employ, who, by his death, would lose their occupation.

Mr. *Shapter* argued, that the three claimants who had but weekly salaries, and resided off the property, were not entitled to participate in the 1,000*l.* He referred to *Jones* v. *Henley* (*c*), where a testator bequeathed "100*l.* apiece to all his servants," the Court declared, that such only as were menial servants, and lived along in the house with the testator. He also referred to *Booth* v. *Dean* (*d*), where the bequest was "to each of my servants one year's wages over and above what may be due to them at the time of my decease," Sir *John Leach* held, that a person working under the testator's gardener, at weekly wages, and a cowboy, who had served the testator for some time at weekly wages, but neither of whom resided with or formed part of the testator's family, were not entitled under the bequest, he being of opinion, that the testator meant only family servants usually hired by the year.

Mr.

(*a*) 4 *Hagg. Ecc. Rep.* 107.
(*b*) 2 *Vern.* 546.
(*c*) 2 *Rep. in Ch.* 361.
(*d*) 1 *Myl. & K.* 560.

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Mr. *Baggallay*, in the same interest, argued, that one test of the claimants coming within the class was, whether they would be entitled, as servants, to mourning, which he considered they clearly would not.

The MASTER *of the* ROLLS.

I think that on authority and on the terms of the will, both the gardener and under-gardener were servants of the testator in every sense of the word. The case of *Townsend* v. *Windham* (*a*) determines that mere residence is not a fact on which the Court ought to proceed in determining the question, whether a person was a servant within the words "living with me at the time of my death." This case is much stronger, the residence of these men might be equally convenient and quite as close as if their cottages belonged to the testator. As to the weekly wages, I believe that to be a very common mode of payment in such cases. The gardener was more than a year in the testator's service, and during that term, he was continuously employed by him in discharge of his duties, and his master would be liable to pay the tax for him as a gardener.

The same observations apply to the under-gardener, and I think it impossible to say that they were not servants in the service of the testator at the time of his decease.

As to the boy, all the arguments which have been used in his favor would apply to a day-labourer and more strongly, for a day-labourer might be continuously and exclusively employed. The boy was only employed during six months in the year, and neither continuously

(*a*) 2 *Vern.* 546.

continuously nor exclusively; for he was at liberty to work for any one else, and the testator could not have treated him as his own servant. A charwoman, who came once a week to a family, might be held to be a servant of a testator with as much reason as the boy.

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Re ATKINSON and PILGRIM.

April 16.

THIS was a very long special petition for taxation of some bills of costs.

A client presented a special petition for the taxation of his solicitor's bill, complaining that the solicitor had taken reckless proceedings, and praying that the costs of them might be wholly disallowed on taxation. A special petition was held to be unnecessary, and the Petitioner was ordered to pay the costs of it.

The Petitioners, the executors of a testator, continued to employ the Respondents, the testator's solicitors, in the management of his estate and affairs. The solicitors entered into a series of legal proceedings against the *Southampton* and *Dorchester* Railway Company, respecting the building of a small station near the testator's property. These were characterized by the Petitioners as being of a reckless and imprudent character, and consisted of a suit in Chancery, and five successive actions.

The result in respect of costs was as follows :—

The costs of the proceedings against the railway company, as appeared by the bills of costs, amounted to 1,419*l.* 4*s.* 9*d.*, and in respect of which, 30*l.* only was recovered from the company for damages, and 628*l.* 4*s.* 6*d.* for costs, leaving a balance in respect of costs of the proceedings of 791*l.* 0*s.* 3*d.*, which sum was now claimed against the executors.

The petition alleged, that neither the Petitioners, nor any one interested, were ever advised by the solicitors, that

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that they would incur, or suspected, in the slightest degree, that they were incurring or could incur, any responsibilities or risk in respect of any proceedings against the railway company. That if it had ever once been suggested by the solicitors, that there was any risk, or that expenses amounting to anything like 700*l.* were likely to be incurred, the said proceedings would not have been taken. That in instituting and carrying on the proceedings, the solicitors were wanting in their duty towards the Petitioners, as executors, and ought at least to have pointed out the risk attending them, and the probable amount of costs that would be incurred, and who would be liable in respect thereof.

The petition alleged, that no advantage could possibly have resulted to the said estate from the actions, and that the Petitioners were advised, that the extent of the said litigation was and is in no way warrantable, and that, under the circumstances, the costs of the actions ought to be wholly disallowed.

The petition prayed that it might be declared, that no sum whatever ought to be allowed, by way of costs, in respect of the actions, and that such parts of the bills of costs as might not be wholly disallowed might be taxed, with such special directions as might be fitting and all usual directions.

Mr. *R. Palmer* and Mr. *Selwyn*, in support of the petition, argued, that a special order was necessary, as upon an order of course, the Applicant must admit his liability on some part of the bills.

Mr. *Lloyd* and Mr. *C. Barber*, *contrà*, did not resist the common order for a taxation, but contended that a special petition was unnecessary, as the taxing master would

would take the matters complained of into his consideration.

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I am of opinion that the taxing master can go into these matters. That was the statement made by Mr. *Follett*, the taxing master, in *Re Clarke* (*a*), and it was concurred in by the Lords Justices. Lord *Langdale* was also of opinion that the taxing master had full authority to go into these questions. The Petitioners must pay the costs of the petition.

(*a*) 1 *De G., M. & G.* p. 46.

In re THE NATIONAL LIVE STOCK INSURANCE COMPANY.

May 24.

THIS was a petition presented by three shareholders for the dissolution and winding-up of this company.

A company established in 1853, had since carried on its business at a loss in every year, amounting in the whole to 6,507*l.* There were irregularities in the management, the directors had not paid for shares subscribed for by them, interest had been paid out of capital, and the balance at the bankers had been reduced to 300*l.*; on the other hand, the calls on the shares had hitherto been one-fifth only: *Held*, by the *Master of the Rolls* and the *Lords Justices* (on appeal), that there was no case for winding it up.

The company was established and registered in 1853, and a deed of settlement prepared and executed in the usual way. The capital was to be 250,000*l.*, in 100,000 shares of 2*l.* 10*s.* each. The preliminary expenses were 5,082*l.*, and although about 70,000 shares had been subscribed for, the calls, amounting to 10*s.* a share, had been paid on 31,171 only. The chairman and the five directors had themselves signed the deed for 14,000 shares, of which they had cancelled 11,000, together with many others, amounting to about 24,000*l.* On the whole, 17,085*l.* only had been paid up for deposits.

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The company carried on their business for some time, but the shareholders becoming dissatisfied, a committee of investigation was appointed, who employed an Actuary to investigate their affairs. He made his report, by which it appeared that the company had been conducting their business at a loss. That although the annual receipts in the years 1854, 1855, 1856 and 1857 had been 8,228*l.*, 13,048*l.*, 13,619*l.*, and 17,696*l.*, still, after deducting the expenses, there had been a loss in every year, and, notwithstanding this, dividends were paid on the shares, but out of the capital. The following is the summary of losses :—

	£	*s.*	*d.*
Loss in 1854	340	5	10
„ 1855	1,103	5	1
„ 1856	4,485	13	2
„ 1857	178	0	2
	£6,507	4	3

The amount subscribed had been employed as follows :—

			£	*s.*	*d.*
To amount received on 34,171 shares . .			17,085	10	0
By preliminary expenses	£5,082	18 6			
Less written off 4 years .	2,033	3 4			
			3,049	15	2
Losses on business			6,507	4	3
Dividends paid			1,473	8	3
Balance			6,055	2	4
			£17,085	10	0

There were liabilities of the company amounting to 1,000*l.*, and outstanding policies exceeding 500,000*l.*, to be provided against, and at the same time, the company's

pany's balance at the bankers had been reduced to 300*l.*

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The Actuary recommended, that all parties who had signed the deed of settlement should be required to pay the deposit on the shares they had subscribed for, which, he said, would provide sufficient capital to carry on the affairs of the company, and afford the only chance of preventing a stoppage for want of funds. He recommended that no further dividends should be paid except out of the profits, and that the expenses of management should be reduced.

At the adjourned meeting of shareholders, held on the 19th of *March*, 1858, the report was received and adopted, and it was resolved, that the directors should convene an extraordinary meeting to consider as to propriety of winding-up the company. The directors immediately afterwards made a call of 5*s.* per share, payable on the 28th of *April*, and convened a special meeting for the 14th of *May*, sixteen days after the call would be payable, so as to exclude all shareholders who had not paid up this call.

Mr. *R. Palmer* and Mr. *Roxburgh*, in support of the petition. It will be for the interest of all the shareholders that this company should be wound up; it is useless to continue to carry on a business by which a loss is annually incurred. The expenditure exceeds the receipts, and all the subscribed capital has been sunk, so that the company is, in truth, insolvent.

The conduct of the managing body shews that it is necessary for the Court to interfere; the directors, who have signed the deed for 14,000 shares, have only paid deposits on 500 each, and they have attempted to cancel

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cancel the rest of their shares, together with others, amounting to 24,000. They are liable for all the shares they have subscribed for; *Williams* v. *Page* (*a*). The management is not *bonâ fide;* flourishing and unwarranted statements have been made as to the affairs of the company, and dividends have been paid out of capital. They cited *Ayre's Case* (*b*); *Ex parte Spackman* (*c*); and see 11 & 12 *Vict. c.* 45, *s.* 5, *cl.* 8.

Mr. *Selwyn* and Mr. *W. W. Cooper*, for the company, after observing that the course taken by the directors was that recommended by the Actuary, were stopped by the Court.

The MASTER *of the* ROLLS was of opinion, that the grounds alleged were not sufficient for ordering the company to be wound up. That the company might be entitled to call upon the directors to pay on the shares originally subscribed for by them, and to enforce the payment of the calls, which, he observed, would make a great difference in the amount of the funds of the company.

He thought that this was not a case for winding-up, and dismissed the petition with costs.

(*a*) 24 *Beav.* 654.
(*b*) 25 *Beav.* 513.
(*c*) 1 *Mac.* & *G.* 170; 1 *Hall* & *Twells*, 229.

NOTE.—Affirmed by the *Lords Justices*, 22 *June*, 1859.

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HUSKISSON *v.* LEFEVRE.

July 16, 19, 20.

Under a trust, during twenty-one years, to accumulate until the same "should amount to the aggregate sum or value of 25,000*l.*" and then invest it in land, the value of part of the property being variable, it was *held*, that the trust for accumulation ceased on the day the funds, if realized, would produce 25,000*l.*

THE testatrix, by her will dated in 1855, devised her *Eartham* estate to trustees for twenty-one years (*a*), in trust to accumulate the rents until the same, "together with her residuary personal estate, thereinafter directed to be accumulated, should amount to the aggregate sum or value of 25,000*l.*," which sum she directed them to lay out in the purchase of lands convenient to be held with the *Eartham* estate. Subject thereto, she gave the *Eartham* estate to the Plaintiff for life, with remainder to his first and other sons in tail, with remainder over.

And the testatrix bequeathed all such shares as she might have, at her decease, in the *Sun Fire and Life Offices* to her trustees, upon trust, with the dividends and annual proceeds thereof, to renew her leaseholds, &c.; and, subject thereto, she declared her will to be, that the said dividends and annual proceeds, and the said shares, should constitute part of her residuary personal estate, but that the said shares should not be sold until all other her residuary personal estate thereinafter directed to be invested in the purchase of lands should be exhausted, nor unless the person for the time being entitled in possession to her *Eartham* estate (he being of full age) should in writing consent to such sale."

The testatrix gave all the residue of her personal estate, after payment of her debts, &c., unto the same trustees,

(*a*) 24 *Beav.* 403.

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trustees, upon trust, "with all convenient speed after her decease, to sell, dispose of, call in and convert *the same* into money, and stand and be possessed of the moneys to be produced by such sale, disposition, calling in and conversion, upon trust, by such investment thereof and the income thereof, as was before declared of the rents and profits of her *Eartham* estate, to permit *the same*, for a period not exceeding twenty-one years from her decease, to accumulate, until, by such means and by means of the accumulation of the rents of her said *Eartham* estate, as aforesaid, the full sum of 25,000*l.* should be accumulated, and then *the same* was, as aforesaid, to be laid out in the purchase of such estates as aforesaid.

The testatrix died in 1856, possessed of 110 *Globe* shares. Their value was very uncertain, being seldom bought or sold in the market. They were, however, now of the estimated value of 17,630*l.*

The aggregate of the present estimated value of the shares, together with the accumulated rents and the personal estate invested in Consols, now amounted altogether to 22,052*l.*, and the Plaintiff had paid into Court 2,948*l.* to make up the 25,000*l.*, in order that he might be let into possession of the *Eartham* estate, this sum had also been invested in the funds.

Several questions, under these circumstances, arose, which were made the subject of a special case.

The next of kin contended, that the corpus of the *Sun* shares, beyond the necessary accumulations of the "dividends and annual proceeds," to make up the 25,000*l.*, were undisposed of. Another question was, whether the *Sun* shares could be sold by the trustees, and

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and a third as to the time at which the shares and the other funds were to be valued, so as to ascertain whether "the aggregate sum or value" of the accumulations amounted to 25,000*l.* Three periods were suggested for that purpose; first, the death of the testatrix; secondly, the present time; and thirdly, at the time when the 25,000*l.* had been actually made up by the Plaintiff (*January*, 1838).

The points principally argued were, that after the 25,000*l.* had been made up, there was an intestacy as to the corpus of the *Globe* shares, a limited accumulation of the dividends alone having been directed. That no sale could take place until the 25,000*l.* had been made up, and that no consent could be given by the tenant for life until that period; and that there was no present mode of making up the 25,000*l.* in consequence of the constant change in the value of the securities.

Mr. *Selwyn* and Mr. *Pemberton* for the Plaintiff, the tenant for life.

Mr. *R. Palmer* and Mr. *Wright* for the trustees.

Mr. *Follett* and Mr. *Wintle*, for the next of kin.

Mr. *Selwyn*, in reply.

The MASTER *of the* ROLLS.

I think there is no intestacy here under any circumstances. The testatrix declared that the "dividends and annual proceeds" of the shares, and the shares, should form part of her residuary personal estate. "She gave all the residue of her personal estate to be sold and invested and accumulated. There is no want of disposition of the residuary personal estate which may

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may exceed 25,000*l.*; but the period when 25,000*l.* has been accumulated is fixed for the investment in land, and for letting the tenant for life into possession. The testatrix did not intend that there should be an intestacy, but she fixed a period when the accumulations were to cease, namely, when they should amount to 25,000*l*, and therefore what was to be invested was the produce of the general personal estate.

She gave "all the residue of her personal estate" in trust to convert "the same" (that is the whole residue) and stand possessed of the moneys, upon trust to permit "the same" to accumulate until the full sum of 25,000*l.* should be accumulated, and then "the same" (which is not the 25,000*l.* but the whole residue as before) is to be laid out.

I am also of opinion that the trust for accumulation ceases, and for making the investment arises, when the whole funds and accumulations would produce the aggregate sum or value of 25,000*l.*, and, at that period, the Plaintiff will become entitled to enter into possession and have the benefit of the accumulated fund. In addition to that, my view with respect to the *Sun shares* is, that there is not an absolute and imperative trust on the trustees to sell the shares, and invest the produce in lands, but that they can only be sold with the consent of the tenant for life.

I will mention the case again to-morrow.

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July 20. On reconsidering the matter I am of opinion, that the testatrix meant the value to be ascertained at the time

time when all the accumulations, if realized, would produce a clear 25,000*l.* The trusts for accumulations were then to cease, and those for investment to arise. She gave to her trustee a power of conversion but directed that it should not extend to the *Globe shares*, unless with the consent of the tenant for life for the time being, who was to be at liberty to have them retained if he thought fit.

SALTER *v.* BRADSHAW.

BRADSHAW *v.* SALTER.

July 19, 20, 21.

The purchase of a reversion cannot stand in equity unless the purchaser shews that he paid the full value for it.

The sale of a reversion set aside after forty years, the vendor having instituted proceedings for that purpose a year after it fell into possession, and the purchaser having failed to prove that he had paid full value for it.

IN 1795, and prior to the marriage between *James Salter* and *Elizabeth Busby*, articles were executed, whereby it was covenanted that some real estate at *Bethnal Green* belonging to Mrs. *Salter* should be settled on Mr. and Mrs. *Salter* for their lives, and afterwards, "to be equally divided between the issue of the intended marriage (if any), share and share alike, and in case there should be no such issue, then as therein mentioned.

The marriage took place in 1795.

In 1796, a settlement was executed, whereby the property was limited to the use of *James Salter* for life, with remainder to Mrs. *Salter* for life, with remainder to the use of the child, if only one, and if more than one, then of all the children of *James Salter* on the body of *Elizabeth King Salter*, his wife, lawfully to be begotten, to be equally divided between them, if more than one, as tenants in common in tail, with cross remainders between them in tail, and on failure of the issue of all such children, to the use of the survivor of

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James Salter and *Elizabeth King*, his wife, in fee simple.

There was issue of the marriage one child only, viz., the Plaintiff, the Reverend *Henry George Salter*, who attained twenty-one in 1817. He was then absolutely entitled in fee or in tail to the property, subject to the life interest in possession of his father *James Salter* (who was then aged fifty-four years), and to the life interest in remainder of *Elizabeth King Salter* (who was then aged forty-seven years) therein, and (as the Defendants alleged, but the Plaintiff did not admit) subject to the contingency of there being one or more other child or children born of the said marriage of *James Salter* and *Elizabeth King Salter*, his wife.

In 1818, the Plaintiff, being in want of money, sold his reversionary interest in the property to Mr. *Bradshaw* for 1,200*l.*, and conveyed it by indentures of the 21st and 22nd of *February*, 1818, and by a fine to the purchaser, and he covenanted to suffer a recovery in order to bar the entail.

The Plaintiff's mother died in 1839, and his father in 1855, and the Plaintiff's estate then fell into possession. In *May*, 1856, the Plaintiff instituted the first suit against the representatives of *Bradshaw*, who was dead, claiming two charges on the estate of 333*l.* and 436*l.*, which he derived from his father in 1847, and also seeking to set aside the purchase of the reversion in 1818, on the ground of its being a sale by him of a reversionary interest, at an undervalue, while in difficulties.

1. The bill prayed, that the indentures of the 20th and 21st days of *February*, 1818, and the fine, might be declared to constitute and stand as a security only for

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for the amount actually advanced by *Bradshaw* to the Plaintiff, with interest thereon.

2. Or if this Court should be of opinion that the indentures of the 20th and 21st days of *February*, 1818, and the fine, operated as an effectual and absolute conveyance, from which the Plaintiff was not entitled to be relieved, then that an account might be taken of the two charges, and that the said Defendants might be decreed to pay the Plaintiff what should appear due thereon, and in default, might be foreclosed.

The representatives of *Bradshaw* instituted the cross suit against Mr. *Salter*, for the performance of his covenant to bar the entail, by a disposition under the Fines and Recovery Act, and for a conveyance of the property to them.

Evidence was entered into by the Defendants as to the value of the reversion at the time of the sale, but it is only necessary to state, that, in the result, the Court was not satisfied that the full value had been given.

Mr. *Selwyn* and Mr. *W. H. Terrell* for the Plaintiff, Mr. *Salter*.

Mr. *R. Palmer*, Mr. *Follett* and Mr. *Sheffield*, for the Defendants.

Edwards v. *Burt* (*a*); *Bowes* v. *Heaps* (*b*); *Headen* v. *Rosher* (*c*); *Potts* v. *Curtis* (*d*) were cited, as to the principles on which the Court acts in setting aside purchases of reversions.

The

(*a*) 2 *De Gex, M. & G.* 55.
(*b*) 3 *Ves. & B.* 117.
(*c*) *M'Clel. & Y.* 89.
(*d*) *Younge*, 543.

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The argument turned principally on the value of the reversion at the time of the sale, and on the reduction on the calculated value, in consequence of the doubt whether the Plaintiff was, under the articles and settlement tenant in tail or in fee, and the chance of other issue of the Plaintiff's parents being born who would have shared with him, and the effect of lapse of time(*a*).

The MASTER *of the* ROLLS said, his impression was, that this purchase could not stand, that there was a question, whether the Plaintiff was tenant in fee or in tail; but still it was the duty of the Defendants to shew that full value had been given.

The MASTER *of the* ROLLS.

July 21. After reading the papers in this case, I have come to the same conclusion as that which I expressed yesterday.

Modern decisions have established this:—that the burden of establishing that a full price has been given for a reversion lies upon the purchaser, and, in order to maintain the validity of such a transaction, it is essential that he should preserve abundant evidence that, at the time he purchased the reversion, it was of the value, and of no greater value, than that which he gave for it. In the present case, the purchaser has not only preserved no such evidence, but he has made it impossible that any such evidence should be obtained. It is out of the question to suppose that the Court can arrive at any satisfactory

(*a*) See *Gowland* v. *De Faria*, 17 *Ves.* p. 27, which was compromised by *Gowland* giving to *De Faria* a mortgage for 5,375*l.*, or about half as much more as *De Faria* would have obtained under the decree.

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satisfactory conclusion from speculative opinions as to the probable value of the property at the time of the sale, derived from its value nine years previous (*a*), or from its value at the present time. It is, as I have already observed, a perfectly *bonâ fide* case, but it is one in which the purchaser has not thought fit to preserve any evidence of its value when he bought it, nor in fact did he ascertain, at the time, what was its value, for that is very clearly shewn; and it is this circumstance, now, when it has fallen in, which has made it impossible to ascertain what the value was.

I think, also, the time cannot be reckoned as a bar to the Plaintiff's demand, although I feel strongly disposed to give the purchaser every advantage that can be derived from the great length of time which has elapsed since the transaction took place, namely forty years; but the reversion did not fall into possession until three years ago, and the bill was filed a year after. If it had been shewn to me that pains had been taken to ascertain the value at the time, that a person had been employed to value it, but that, by reason of death or other circumstances, the evidence could not now be procured, it would have been a matter of great importance, but it is proved to me that the value was not ascertained, and the result is, the transaction must be set aside.

Declare the purchase ought to be set aside, and that the conveyance ought to stand as a security for what may be found due to the Defendants.

Take an account of the 1,200*l.* and sums expended for lasting repairs and interest at five per cent. on the 1,200*l.*

(*a*) On a partition, in 1818, the property was valued at 7,603*l.*

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1,200*l.* and an account of the rents received by the Defendants, and direct a reconveyance, on payment of the balance.

No costs up to and including the hearing.

NOTE.—The suits were compromised, upon payment to the Plaintiff of 11,000*l.* (30th *July*, 1859). The present rental, which had greatly increased, from accidental circumstances, was said to be 928*l.* 5*s.* a year.

KING *v.* CLEAVELAND. (No. 2.)

Nov. 4.

Bequest to *A.* and his wife for their lives, and, after their decease, in trust for their children "then living, or their legal personal representatives, share and share alike." A daughter died in the life of the testator, without leaving issue: *Held*, that her next of kin were entitled, and not her husband who had taken out administration to her.

THIS case is reported, *antè* (*a*). The present question arose under the following circumstances:—

The testator, by his will dated in 1841, bequeathed a sum of 4,000*l.* Three and a half per Cents. to trustees, upon trusts which he declared in the following terms:—"Upon trust to stand possessed thereof, and to pay and apply the interest and dividends thereof to and for the use and behoof of my brother *Richard Francis Cleaveland*, and his wife *Eliza Cleaveland*, and the survivor of them, for his and her natural lives; and after the decease of my said brother and his said wife, then in trust to pay and apply the said sum of 4,000*l.* Stock equally amongst my nephews and nieces (children of my said brother *Richard Francis Cleaveland* and his said wife) *then living, or their legal personal representatives, share and share alike.*"

The testator died in 1844, his brother *Richard Francis* died in 1849, and his wife in 1857. They had seven

(*a*) *Page* 26.

seven children, one of whom, *Henrietta* married *St. Barbe*, and died without issue in 1843, after the date of the will, but in the life of the testator. Mr. *St. Barbe* took out administration to his wife, and claimed one-seventh of the fund as her "legal personal representative."

Mr. *Selwyn* and Mr. *Hobhouse*, for Mr. *St. Barbe*, argued that the husband, whom the law designated as the representative of his wife, was "the legal personal representative" in every sense, and that he and not her next of kin were entitled. They cited *Dixon* v. *Dixon* (*a*); *Crawford's Trusts* (*b*); *Jacobs* v. *Jacobs* (*c*); *Smith* v. *Palmer* (*d*); *Doody* v. *Higgins* (*e*); *Low* v. *Smith* (*f*); *In re Walton's Trust* (*g*).

Mr. *R. Palmer*, Mr. *Lloyd*, Mr. *Teed*, Mr. *Follett*, Mr. *Osborne* and Mr. *Martelli* were not heard.

The MASTER *of the* ROLLS.

I am satisfied that this question is involved in my previous decision. I decided, on the former occasion, that the words "legal personal representative" meant next of kin, and when it is contended, that the husband is entitled, it can only be in the character of one of the next of kin.

It is important to distinguish between the cases where property is given to the legal personal representatives, in the ordinary and primary sense of the word, from those cases where it is given to such representatives in a secondary

(*a*) 24 *Beav.* 129.
(*b*) 2 *Drewry*, 238.
(*c*) 16 *Beav.* 557.
(*d*) 7 *Hare*, 225.
(*e*) 2 *Kay & J.* 729.
(*f*) 25 *L. J., Ch.*, 503.
(*g*) 25 *L. J., Ch.*, 569.

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a secondary sense, or to the next of kin; for where it is given to the person who happens to prove the will or take out administration, the same question arises as in *Long* v. *Watkinson* (*a*), whether they take in the character of representatives or beneficially.

I have already decided in this case, that "legal personal representative" means next of kin, and I am bound by that decision. Then the question is, does a husband sustain the character of next of kin of his wife. I wanted to hear some case cited in which the words "legal personal representatives," when held to be "next of kin," had ever been extended beyond next of kin according to the statute: if it means next of kin according to the statute, the husband is excluded, for it is admitted that he does not take under the statute but paramount to it; and the Court has always held that next of kin according to the statute does not include the husband.

(*a*) 17 *Beav.* 471.

NOTE.—Affirmed by the full Court of Appeal, 2nd *July*, 1859.

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CARNOCHAN *v.* THE NORWICH AND SPALDING RAILWAY COMPANY.

March 22, 23.

A railway company gave notice to a tenant at will to take part of the lands, and they were allowed to take possession and complete their line. Afterwards, a person, who had subsequently to the notice purchased one-ninth of the land, filed a bill, merely praying an injunction to restrain the railway company from entering upon, continuing in possession of, or otherwise interfering with the land. The bill was dismissed, with costs.

A FARM had been devised to *Elizabeth*, the wife of *Thomas Edward Savage*, for life, and after her decease to her children and their heirs equally. *Elizabeth Savage* died, leaving nine children, of whom *Elizabeth Johnson*, as one, was entitled to one-ninth of the property. *Thomas Edward Savage* remained in possession of the devised property as tenant at will. He had also other adjoining property of his own. The Defendants' railway passed through both properties, and Mr. *Savage* was represented, in the book of reference, as being the owner, or reputed owner, of both these properties. In *May*, 1855, the railway company served notice upon Mr. *Savage* that certain parts would be required for the railway, and he forwarded his assent thereto.

On the 8th of *July*, 1835, *Elizabeth Johnson* and her husband mortgaged her ninth of the property to the Plaintiff to secure 200*l*.

In *March*, 1856, the company were allowed to take possession of the property required for the construction of the railway, including about half an acre of the devised property. They fenced it off, and in *July*, 1856, had completed the railway, except as to laying the rails.

In *January*, 1857, the Plaintiff purchased from Mr. and Mrs. *Johnson* their equity of redemption in their one-ninth

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one-ninth of the property. He then commenced a correspondence with the company, who asked him to produce his title deed, and a long correspondence ensued.

The Plaintiff insisted that Mr. *Savage* had no authority to act for Mr. and Mrs. *Johnson*, and he required "his rights as owner of the soil to be respected," and a proper compensation rendered for the trespass committed by the company. The Defendants proposed a valuation by reference and payment, which the Plaintiff declined, and ultimately, in *July*, 1857, the Plaintiff filed this bill, insisting that no agreement, instrument or conveyance had been entered into by Mr. and Mrs. *Johnson*, and that the company had not taken the usual steps, by notice, to obtain possession under the acts.

Mr. *Selwyn* and Mr. *William Foster* for the Plaintiff.

Mr. *R. Palmer* and Mr. *C. L. Webb* for the Defendants.

Mr. *Selwyn* in reply.

The following authorities were referred to:—*Webster* v. *The South Eastern Railway Company* (*a*); *Adams* v. *The London and Blackwall Railway Company* (*b*); *Deere* v. *Guest* (*c*); 8 & 9 *Vict.* c. 18, sects. 37, 68, 77, 108 to 114, 124.

The MASTER *of the* ROLLS.

It is obvious that the injunction, which is the only relief asked, cannot be granted.

IN

(*a*) 1 *Sim.* (*N. S.*) 272.
(*b*) 2 *Mac. & G.* 118.
(*c*) 1 *Myl. & Craig*, 516.

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In *May*, 1855, the railway company gave the proper notice to a person in possession, apparently as owner, and at that time, the Plaintiff had no interest whatever in the property. The company were allowed to take possession in *March*, 1856, and they immediately begun to construct their railway, and completed it in *July*, 1856, except laying the rails. The Plaintiff became purchaser in *January*, 1857, of the land of which possession had been given, and on which the railway has been constructed. He was, in truth, but the purchaser of an interest in the purchase-money. In this state of things, *Deere* v. *Guest* is strictly applicable; this is a much stronger case, for there possession had been obtained from the tenant by circumvention and fraud. Here possession has been given, the railway has been constructed, and it is, therefore, impossible to grant an injunction to restrain that which is complete.

I am of opinion, that the Plaintiff cannot have the relief he asks, although he may be entitled to some relief under the act or by ejectment. I will dispose of the costs to-morrow.

The MASTER *of the* ROLLS.

March 23.

I retain the opinion I have already expressed, that this suit fails altogether. The Plaintiff must pay the general costs of the suit, but he must be allowed the costs of the Defendants contesting his title. The reason is obvious: in the view I take of the case, the Plaintiff was not entitled to the injunction; he has a right to be paid for the land, but not in a Court of Equity. His title therefore was not a matter to be determined in this suit.

In re MAINWARING.

November 3.

When an order is made under the Trustee Act, to be acted on by the Bank of *England*, the order should shew that the case comes within the act.

THIS was a petition for the appointment, under the Trustee Act, of two new trustees, and the transfer to them of money in the public funds. One of the trustees was resident out of the jurisdiction.

The order was made in *July* last, but, as drawn up, it did not state that it appeared to the Court that the trustee was resident out of the jurisdiction, so as to bring the case within the Trustee Act. The Bank objected, that it did not appear, on the face of the order, that the case came within the Trustee Act.

Mr. *Preadergast* applied to vary the order, by stating that it appeared to the Court that the trustee was resident out of the jurisdiction.

The MASTER *of the* ROLLS ordered the recital to be inserted.

NOTE.—See *Ellis's Settlement*, 24 *Beav.* 426.

In re THE MEXICAN AND SOUTH AMERICAN MINING COMPANY. (No. 1.)

April 24.

The creditors' representative appointed under the 20 & 21 *Vict.* c. 78, is entitled to attend on the settlement of the list of contributories.

ON the 24th of *November*, 1857, an order was made for winding-up this company. Under the 20 & 21 *Vict.* c. 78, s. 1, a creditors' representative was appointed, who applied to the Chief Clerk for leave to attend at the settlement of the list of contributories. The application was adjourned into Court.

Mr. *Follett* and Mr. *Southgate*, for the creditors' representative,

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representative, argued, that it was necessary, for the interests of the general body of contributories, that the creditors' representative should attend in order that no solvent contributory should escape.

Mr. *R. Palmer* and Mr. *Roxburgh*, for the Official Manager, argued, that it would be incurring an unnecessary expense, to allow the creditors' representative to intervene in every case where the simple question was, whether a man was or was not a contributory. They urged that the advertisement referred to in the first section of the act, to appoint an official manager "to represent all the creditors of the company" in and about the said proceedings, "or in and about *so many and such of the same proceedings as to the judge or master should, from time to time* seem expedient," shewed that there was a discretion committed to the Court, to be exercised from time to time, as to what proceedings the creditors' representatives should attend. They refered to *The London and Eastern Banking Corporation* (*a*); *Re The Royal British Bank* (*b*).

Mr. *Selwyn* and Mr. *Cotton*, for two contributories.

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I am of opinion, that, under the act, the creditors' representative has a right to attend the settlement of the list of contributories. I have looked at the act with an inclination to come to a different conclusion, for, unfortunately, the expense will fall on the contributories.

(*a*) 4 *Kay & J.* 273. (*b*) 3 *Drew.* 637.

NOTE.—Affirmed by the *Lords Justices*, 5*th May*, 1858.

1859.

SCOTT *v.* JOSSELYN.

Jan. 11.

A testator bequeathed the residue to trustees, upon trust to permit his wife to receive the annual produce during her life, and also to apply to her own use such parts of the capital as she should think proper, and after her decease to stand possessed thereof, upon trust for such persons as she should by will appoint, and in default, upon trust to pay certain legacies:—*Held*, that the widow took a life estate only, with power of disposition of the capital during her life and of appointment by will, and not an absolute interest.

CHARLES LIONEL SCOTT, the testator in this case, gave all the residue of his estate and effects, of what nature or kind soever, unto his said wife, and *James Josselyn*, upon trust to permit his said wife to receive or retain the annual produce thereof for her own use and benefit during her life, and also to apply to her own use and benefit so much and such parts of the capital thereof as she should think proper, and, after her decease, the testator directed that *James Josselyn* or the trustees for the time being of his will should stand possessed of the residue of his estate and effects, or so much thereof as should remain after such application of any portions thereof by his wife in manner aforesaid, upon trust for such person and persons and for such intents and purposes in all respects as his wife by her will or by any testamentary paper by her legally executed should direct or appoint; and in default of any such direction or appointment, and so far as any such, if incomplete, should not extend, he directed that the residue of his estate and effects, or so much thereof as should remain as aforesaid, should be holden upon trust to pay thereout the sums of money therein specified unto the several persons therein named, and amongst others the sum of 1,500*l.* to his nephew, a legacy of 1,500*l.* to the Plaintiff Mr. *Scott*, his nephew; and as to all the surplus of the residue of his estate and effects, the testator gave the same upon trust for the said Defendant *Josselyn*, his executors and administrators for his and their own use and benefit absolutely; and in case his wife should apply to her own use such an

an amount of his residuary estate as would reduce the same to a sum of money insufficient to discharge all the legacies, then the testator directed that the legatees thereof should receive a proportional abatement of their respective legacies.

The testator died in 1845, and his widow received the annual produce of the residue of the testator's estate and effects during her life, but she did not apply to her own use and benefit any part of the capital thereof. By her will dated in 1854, she expressly declared her mind and will to be, that nothing therein contained should be deemed or construed to be an execution or exercise of the power of appointment given or reserved to her in and by the last will and testament of the said *Charles Lionel Scott* her late husband deceased, as to the residue of his estate and effects, or in any manner alter or affect the directions, trusts and dispositions in the said will expressed, declared and contained thereof in default of appointment; but that, on the contrary, the same trusts, directions and dispositions should be and remain in full force and effect. And the testatrix thereby nominated and appointed her brother the above-named Defendant *James Josselyn*, and her nephew *James Josselyn*, executors of her said will.

She died in *April*, 1858.

The Plaintiffs filed this bill for payment to them of the legacies bequeathed by the testator's will. The question was, what interest the widow took under the gift of residue.

Mr. *R. Palmer* and Mr. *Elderton* argued, that she took a life interest with a power of appointment. They cited

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cited *Reith* v. *Seymour* (*a*); *Surman* v. *Surman* (*b*); *Re Sanderson's Trust* (*c*).

Mr. *Selwyn* and Mr. *R. Moore* argued, that there was an absolute gift in the first instance, followed by a power and a gift over in default of appointment, inconsistent with the prior gift, and therefore void. They cited *Hughes* v. *Ellis* (*d*); *Holmes* v. *Godson* (*e*); *Barton* v. *Barton* (*f*).

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It is obvious, that this is a power in the proper sense of the term. There is a gift of the residue to trustees upon trust to permit the widow to receive the annual produce during her life, and also to dispose of such parts of the capital as she should think proper, that is in effect, that they were to pay it to any person she might direct in her life; then follows a power to her to appoint what might remain by her will, and a gift in default of appointment to the Plaintiffs and others. I think this a plain case of a life interest, with two powers of appointment, and as the widow has not executed them either in her life or by her will, the residue must go as the testator has directed it to go in default of appointment. There must be a decree for payment to the Plaintiffs of their legacies, with 4*l.* per cent., from the death of the testatrix.

(*a*) 4 *Russ.* 263.
(*b*) 5 *Mad.* 123.
(*c*) 3 *Kay & J.* 497.
(*d*) 20 *Beav.* 193.
(*e*) 2 *Jur.* (*N. S.*) 383.
(*f*) 3 *Kay & J.* 512.

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BARCLAY'S CASE.

In re THE MEXICAN AND SOUTH AMERICAN MINING COMPANY.

May 7.

Prior to the Joint Stock Companies' Registration Act, an unincorporated company was established, whose shares passed by delivery. The Court (without expressing any opinion on the legality of the company) *held*, that a holder of shares at the date of the winding-up order, who was not an original allottee but had purchased them and received dividends, was a contributory; liberty was reserved to him to move to discharge the winding-up order, on the ground of the illegality of the company.

THIS company was established in *London* in 1835 for mining purposes in *Mexico* and *South America*. It was what is termed "a *scrip company*," having no deed of settlement, the only regulations being indorsed on the scrip certificates. The company was established prior to the passing of "The Joint Stock Companies' Registration Act" (7 & 8 *Vict.* c. 110), and had neither been incorporated by act of parliament nor by royal charter. Scrip certificates were issued, which were signed by three directors, and were transferable by delivery; these certificates stated, that the *holder* thereof was entitled to a specified number of shares in the company. Additional shares were afterwards issued, and, in *February*, 1855, a General Meeting passed a resolution to create 10,000 additional shares of 10*l.* each, to stand on the same footing as the original shares, and which were issued at 6*l.* 10*s.* per share. The company became embarrassed, and ultimately an order was made on the 24th of *November*, 1857, to wind it up.

At the date of the winding-up order, Mr. *Barclay* was the holder of eight certificates for five shares each, or of forty of the new shares. He was not an original allottee, but had purchased them on the Stock Exchange, and he had paid one call and received two dividends on these shares.

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The Official Manager now sought to place Mr. *Barclay* on the list of contributories for forty shares.

Mr. *R. Palmer* and Mr. *Roxburgh* for the Official Manager. Mr. *Barclay* is the possessor of these shares, and has received the profits and been admitted as a member, he is therefore a contributory towards its losses. They cited *Bagshaw* v. *The Eastern Union Railway Company* (*a*); *Straffon's Executors' Case* (*b*).

Mr. *Selwyn* and Mr. *Cotton* for Mr. *Barclay*. A company professing to create shares, transferable by delivery, is an illegal association, in the affairs of which this Court will not interfere. It professes to place the holder for the time being of a scrip share in the precise situation of the previous holder, and to give the former all the rights and to impose on him all the liabilities of the latter. This can only be done by Act of Parliament or by royal charter. The pretending to create transferable stock is pretending to act as a corporation, and "persons who, without the sanction of the legislature, presume to act as a corporation are guilty of a contempt of the King by usurping on his prerogative." The acting therefore as such a corporation, without a charter from the Crown, or authority from the legislature, is contrary to law; *Blundell* v. *Winsor* (*c*); *Clough* v. *Ratcliffe* (*d*); *Duvergier* v. *Fellows* (*e*).

2nd. The creation of the new shares was wholly unauthorized by the partnership contract, and the terms on which they were issued were such as not to bind the members of the company; *Ex parte Morgan* (*f*).

3rd. If

(*a*) 7 *Hare*, 114.
(*b*) 1 *De Gex, M. & G.* 576.
(*c*) 8 *Simons*, 601.
(*d*) 1 *De Gex & Sm.* 164.
(*e*) 5 *Bing.* 248; 1 *Cl. & Fin.* 39.
(*f*) 1 *Mac. & Gor.* 225.

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3rd. If any one be liable for these shares it is the original allottees, for there is no contract or other legal means by which the mere holders can be substituted for them and put in their place.

4th. The winding-up order is irregular; this is not such a company as can be wound up under the Acts.

The MASTER *of the* ROLLS.

May 8.

Three questions arise in this case. The first and most important is, whether this is an illegal association, and consequently one which this Court cannot sanction or notice, so as to make any decree or order for ascertaining the rights and liabilities of the various shareholders and partners among themselves; but must altogether withhold the exercise of its powers and functions, and decline to interfere at all in the matter. It was said, in argument, that this question has already been decided by the winding-up order which the Court has made in this case. That is true, but I am of opinion that that order does not bind Mr. *Barclay*, who is now sought to be made a contributory. If the association be illegal, it is obvious that no stranger has any interest in the question whether this Court will interfere in the matter or not, or whether the attention of the Court has been properly called to the fact that this association is one in favor of which it will not exercise its powers. But on the other hand, as soon as a person is sought to be made a contributory or a partner in the partnership, it then becomes a matter of vital importance to him to submit to the Court the grounds upon which he considers the association to be one in respect of which this Court ought not to interfere at all. Although I think that Mr. *Barclay* cannot raise the question on

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this occasion, and although I shall assume that the winding-up order is correct, still, if I make him a contributory, I ought to give him leave to move, within a reasonable time, to discharge the order for winding up the Company. In that event, he must give due notice to the other side, in order that they may be prepared to meet him, which they can hardly be expected to be upon the present occasion. I must therefore, for the present, assume the order to be right, and shall not express any opinion as to whether this association, which professes to create stock assignable by the mere transfer of the scrip, and was established prior to the Joint Stock Companies' Registration Act (*a*), is or is not illegal.

With respect to the other two points, I think it is only necessary for me to refer to the second, which is this:—whether, assuming the legality of this company, the new shares could be issued consistently with the scope and meaning of the provisions of the partnership which these persons have entered into? I am of opinion that Mr. *Barclay* has bound himself, by his own acts, not to take that objection, that it does not lie in his mouth, and that it is not in his power to assert, that these shares were not lawfully and legally issued by the company. The question arises thus:—the original shares were 10*l.* shares, and in *February*, 1855, additional shares were created, giving the holders, upon payment of 6*l.* 10*s.* only per share, the same rights and privileges as the original shareholders who had paid 10*l.* per share. It is said that this was not within the ordinary scope of a partnership which necessarily professes equality, and that it could only be done with the sanction and consent of all the other shareholders of the company. Now, assuming that to be so, and that every shareholder in the

(*a*) 7 & 8 *Vict. c.* 110 (*5th Sept.* 1844).

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the company who had not attended the meeting and sanctioned that particular proceeding could raise that objection, if he thought fit, I am still of opinion that Mr. *Barclay* cannot raise it, because the scrip which he took expressly stated these facts, and gave him notice of the very objection; and subsequently to that, he sends a written notice to the company claiming the benefit of his shares, and insisting on the payment of the dividends, two of which were actually paid to him. He is no more able to take that objection than a shareholder would be able to say that these shares were illegally issued and ought to be taken away from Mr. *Barclay*. If the converse case had occurred, and this company had turned out a prosperous and profitable speculation, and one of the old shareholders, who had, with full knowledge of the circumstances, received the benefit of the money paid for the new shares, had, after the concern had turned out successful, sought to set aside the new shares, for the benefit of the original shareholders, upon merely repaying to the new shareholders the deposit and interest, and making them account for the dividends which they had received, I should hold, that, in the events which have happened, no shareholder could adopt that course.

Exactly in the same way and by the same course of reasoning, I am of opinion, in the converse case, that Mr. *Barclay* cannot now insist upon that objection. In saying this I assume the company to have been legal, and I express no opinion whatever as to whether these shares were or were not legally issued by the company, or whether a person who had no notice of the circumstances and had not acquiesced in it could now set it aside.

The result is, that Mr. *Barclay* must be put on the list

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list of contributories, but with liberty to him, if he should think fit, to move to discharge the original winding-up order, which is the foundation of the whole proceedings in this matter.

FINLAY, HODGSON'S CASE.

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May 12.

Shares in a scrip company passed by mere delivery, *Held*, that *London* bankers who had in their hands, at the date of the winding-up order, shares belonging to foreign correspondents, and on which they had received the dividends, were not contributories.

THIS was a "scrip company," neither chartered nor registered, and the shares were transferable by delivery, as stated *ante* (*a*). The Official Manager now sought to place Messrs. *Finlay, Hodgson* & Co. on the list of contributories.

This firm were general merchants and foreign bankers in *London*, and in 1837 they had purchased sixty shares in the company, on which they had received seven dividends, and they were the holders of these shares at the date of the winding-up order.

Besides these sixty shares, Messrs. *Finlay, Hodgson* & Co., at the date of the winding-up order, were the holders of 1,395 other shares in the company, not as owners, but on account of Messrs. *Muriel*, their correspondents in *Paris*, to whom they really belonged. Messrs. *Muriel* had left them in the hands of *Finlay, Hodgson* & Co., as their bankers, to receive the dividends, it being a great part of the business of Messrs. *Finlay, Hodgson* & Co. to receive dividends for their foreign correspondents. As the dividends became due Messrs.

(*a*) *Barclay's Case, p.* 177.

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Messrs. *Finlay, Hodgson* & Co. detached the coupons from the scrip and sent in to the company a claim for the amount, which they received and accounted for to their correspondents. They, however, gave no notice to the company that they held these shares as agents for their foreign correspondents.

Mr. *R. Palmer* and Mr. *Roxburgh* for the Official Manager, and Mr. *Follett* and Mr. *Southgate* for the creditors' representatives. These shares passed by delivery, and the holders, at the date of the order to wind up, are contributories, and Messrs. *Hodgson*, who were the holders at the time, should therefore be placed on the list. They gave no notice that they were trustees, Messrs. *Muriel* were unknown to the company, and the only persons known or recognized were Messrs. *Hodgson*, who received the dividends in their own name. Whatever may be the rights as between them and Messrs. *Muriel*, they alone, as regards the company, were the legal owners of the shares.

Again, if an agent deals with another, without disclosing his principal, he renders himself personally liable; that is the case here, and they have rendered themselves liable for the debts of the concern by holding themselves out as partners in it. If a man might escape being made a contributory on the plea of being a trustee, he might go on receiving dividends until the last moment, and then say that he is a trustee for some one else, who might be a pauper. They cited *Paley on Principal and Agent* (*a*); *Story on Principal and Agent* (*b*); *Thompson* v. *Speirs* (*c*).

Mr. *Selwyn* and Mr. *Cotton*, for Messrs. *Finlay, Hodgson*

(*a*) *Page* 371. (*b*) *Page* 261. (*c*) 13 *Sim.* 469.

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Hodgson & Co., admitted, that as to the sixty shares, they were bound by the decision in *Barclay's Case* (*a*). They were not called on by the Court as to the other 1,395 shares held in trust.

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As regards the shares which Messrs. *Finlay, Hodgson* & Co. held as trustees for other persons, I think they are not liable as contributories.

It is undoubtedly true, that an agent, who deals as vendor or purchaser without disclosing, at the time of the contract, that he is a mere agent, renders himself personally liable. But that is not the question which arises in this case, but it is as to the liabilities of members of a partnership *inter se*. I intend to express no opinion as to the liability of Messrs. *Finlay, Hodgson* & Co. to the creditors of the concern, on the ground of their having held themselves out to the world as partners in the concern. Although they may not be liable as between partners or as contributories, I do not mean to say that they may not be liable to the creditors of the concern, who may have dealt with the partnership on the faith of their being members, on the ground of their having held themselves out ostensibly as partners of the concern, and of their having given a sanction and credit to its stability which it would not otherwise have acquired.

The ground on which I proceed is this:—I observe nothing which makes it illegal for a person to become a partner merely as trustee, in which case he would only be a partner in name, and the real and substantial partner

(*a*) *Ante, p.* 177.

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partner would be his *cestui que trust.* I find no rule of the company which prohibits a person becoming a trustee of shares for another; and I find from the evidence that in one instance, at least, the directors knew that Messrs. *Finlay, Hodgson* & Co. held shares merely as trustees for others. That being the case, I am of opinion that this partnership was formed upon the principle, that persons might hold shares in trust for others, whose names were unknown to the concern. Again, I find no rule of this company making the validity of assignments of shares depend upon any sanction of the company itself, in which case, it might be impossible for persons to hold shares as trustees for others, unless the company knew that the *cestuis que trust* were solvent persons and approved of them. But as there is no rule that persons shall not hold as trustees for others, and as it was known to the company in one instance at least, that they did so, I see nothing to prevent persons, who are nominally shareholders upon the books, from holding shares as trustees for other persons who will, as between the partners themselves, be entitled to the benefit, and liable to the obligations of the concern.

This question might be very important to the interests of the company in whichever way it was decided. In some instances, the trustee might be a very wealthy man, and the *cestui que trust* a very poor one, and in others it might be the reverse; but all these cases must be regarded with reference to the dealing and practice of the company, and to the rules that have been sanctioned by them, and the practice which admits of this mode of dealing.

Undoubtedly, the case suggested in the argument might arise, viz. of a person getting rid of his shares at the

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the last moment, and then asserting that he had never been the beneficial owner of the shares, but that he held them only as a trustee for another person. If that were established, the person who had so got rid of the shares in order, unfairly, to get rid of his liability, would be placed on the list as a contributory, and would by this Court be held to be liable to the same obligations as if he had not endeavoured to get rid of his shares in this mode. The utmost that can be said in those cases is, that it may sometimes create difficulties in respect of evidence.

I am of opinion, in this case, that Messrs. *Finlay, Hodgson* & Co. must be put on the list of contributories in respect of the sixty shares which they held beneficially, but not in respect of the remaining shares, of which, it is established, that they were *bonâ fide* trustees for other persons.

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In re CAREW'S ESTATE.

Nov. 20.
Dec. 3.

On a sale under the Court, two persons agreed not to bid against each other, but that one should bid up to 1,500*l.* and divide the lot between them. They bought it for 650*l.* *Held*, that this agreement furnished no ground for opening the biddings, or annulling the sale.

SOME land was sold by auction under the Court in lots, and lot 2 adjoined the lands of Mr. *Peek* and Mr. *Watney*. On the day of the sale, Mr. *Peek* and Mr, *Watney* entered into an agreement not to bid against each other, but that *Peek* should buy the lot, if it could be got for 1,500*l.*, and then divide it between them in certain proportions. Accordingly, Mr. *Peek* bid at the auction, and became the purchaser for 650*l.*

The reserved bidding had, unknown to them, been fixed at 600*l.*

The sale was confirmed by the Court, the title was accepted and the conveyance approved of, but before it was executed, Mr. *Peek* and Mr. *Watney* disagreed as to the division of the property, and notice of the agreement was given to the vendors, who took out a summons to set aside the sale, which was adjourned into Court.

Mr. *Southgate* for the vendors. This purchase was inequitable and void, it is the exact case stated by Lord *St. Leonards* (*a*) in which this Court will rescind a sale. He says:—"Fraud will, of course, be a sufficient ground for opening the biddings. Therefore, *if the parties agree not to bid against each other*," . . . "the Court would open the biddings, although the report had been absolutely confirmed." In *Scott* v. *Nesbit* (*b*), the Lord Chancellor said, that "if it could be clearly and unequivocally established that there was any private agreement

(*a*) *Sug. Vendors*, 93 (13*th ed.*). (*b*) 3 *Bro. C. C.* 475.

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ment between the bidders not to bid against each other, that is a practice the Court ought to prevent." Here it is clear, that the parties themselves valued this lot at 1,500*l.*, and that they were prepared to give that sum for it, but by this private arrangement they have obtained it for 650*l.* There has been no fair competition between the persons to whom this land was an object, and who were most disposed to bid for it against each other; it has been prevented by a private arrangement between the respondent, and the sale ought therefore to be annulled.

Mr. *J. T. Wood* for *Peek*. There is no authority for the proposition, that two persons may not agree to become joint purchasers of a property sold by the Court. Lord *St. Leonards'* statement is wholly derived from *Scott* v. *Nesbit*, which is a mere statement of Counsel *arguendo*, and has never yet received the sanction of the Court.

There is nothing whatever objectionable in this purchase; these two persons were not prepared to buy the whole lot, and they agreed to purchase it for their mutual benefit and divide it according to their requirements. The vendors have no reason to complain; they have obtained for this lot 50*l.* more than the reserved price, at which they were ready to sell it. After the confirmation of a sale, the Court will not open the biddings upon a mere advance of price, here no advance whatever is offered, and on a second sale the property might produce less.

Mr. *Dickinson* for *Watney*.

Mr. *Southgate* in reply.

The

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In re CAREW'S ESTATE.

Dec. 3.

This is an application to open a sale made under the direction of the Court, on the ground of an inequitable agreement between two persons desirous of becoming the owners of Lot 2 not to bid against each other. The reserved price of the lot was 600*l.*, and it sold for 650*l.* It appears that Mr. *Watney* and Mr. *Peek* entered into an agreement, on the day of the sale, not to bid against each other, but that one should buy the lot, if it could be got for 1,500*l.*, and that then it should be divided between them in certain proportions.

I am not aware of any case, or of any principle which establishes that such an agreement is inequitable. It is the amount which has here given rise to the question, for if the agreement of these gentlemen had been that they would go as far as 700*l.* and no further, instead of 1,500*l.*, I should not have heard of it. But how can the amount affect the principle or the validity of the purchase? Its validity must depend on the legality of such an agreement, and not on the amount to be given. Suppose the reserved price had been 1,200*l.* or 1,400*l.*, would not the agreement have been the same in character? for it is on the ground of fraud alone, if at all, that the sale can be opened. This is not like a case of opening biddings on the ground of an advance in price; here no such offer is made, and, if it were, it would be too late after the purchase had been confirmed, the title accepted, and the conveyance approved.

If the sale can be set aside on the ground of fraud, time would not affect the question; it might be set aside even after the conveyance, and as soon as the fraud had been discovered; but I have been unable to discover any principle on which this application can be supported,

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supported, and I should not have reserved my judgment if I had not been referred to a passage in *Sugden's Vendors*, to this effect:—" Fraud will, of course, be a sufficient ground for opening the biddings. Therefore, if the parties agree not to bid against each other, or &c. &c." He then goes through instances which are distinct and manifest frauds and concludes, " the Court would open the biddings." On this statement I was desirous of considering the point more fully, and I have referred to the case there cited, *Watson* v. *Birch* (*a*), but I find that it does not bear out the proposition, that a mere agreement, between two persons, each desirous to buy a lot, that they will not bid against each other, is sufficient to invalidate a sale to one of them; nor do I think that Lord *St. Leonards* intended to state the proposition to that extent. However, I am not aware of any rule to that effect.

I cannot therefore set aside this sale on the ground that these gentlemen have entered into this agreement. All that is proved is, that the persons who have sold the estate were not aware of the real value of this lot, and it is to be inferred, that if they had known what the Court now knows, they would have fixed a much higher reserved price, but this is no reason for opening the sale.

I am of opinion I cannot set it aside, and that I must refuse the application.

(*a*) 2 *Ves. jun.* 51.

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WHITE, on behalf, &c., *v.* JAMES. (No. 2.)

Nov. 17.

A sale of lands decreed to raise arrears of a rent-charge granted with powers of distress and entry, there being nothing to distrain on, and there being twenty other concurrent rent-charges with like remedies.

Cupit v. *Jackson* (13 *Price*, 721) followed.

Suit by a grantee of a rent-charge, on behalf of himself and twenty others, to raise the arrears by sale sanctioned.

ROBERT SMALE was seised in fee of a plot of ground on *Hounslow Heath*, on which six cottages were erected.

By an indenture of the 30th of *January*, 1845, *Robert Smale*, in consideration of 50*l.*, granted to the Plaintiff for ever a rent-charge of 40*s.*, issuing out of this piece of land and the six cottages. *Smale* thereby covenanted, that if it should be in arrear for forty-one days, the grantee might enter and distrain, and sell the distresses in like manner as distresses reserved by lease or common demise; and that if in arrear six months, the grantee might enter and hold for his own use until the arrears should be paid. He also covenanted for title, and that the hereditaments should, for ever, remain charged with the rent-charge, free from all incumbrances, except those in the schedule.

The schedule specified twenty similar grants of rent-charges of 40*s.* which had been granted out of the same property on the same day.

In *March*, 1845, *Smale* sold and conveyed the property, thus charged with the rent-charges, to the Defendant *James*.

The Plaintiff's rent-charge had fallen into arrear since *January*, 1854. In *May*, 1854, two of the tenants quitted possession, in consequence of the Plaintiff's threatening

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threatening to distrain, and in *August*, 1854, the Plaintiff and other grantees having distrained for 55*l*., the other tenants quitted. The premises remained unoccupied, there was nothing on which a distress could be levied, and they were totally unproductive and falling into decay.

The Plaintiff *White* filed his bill, "on behalf of himself and all other the grantees of yearly rent-charges of 40*s*. each issuing out of the hereditaments in the pleadings mentioned," against *James*, praying an account of the arrears, and, in default of payment, that the amount might be raised by sale or mortgage, and "that the residue of the purchase-money might be invested, for the purpose of securing the due payment of such rent-charges for the future."

On a former occasion (*a*) a receiver had been appointed, and the cause now came on for hearing.

Mr. *R. Palmer* and Mr. *W. Morris* for the Plaintiff. In this case, there are twenty-one concurrent rent-charges, having concurrent remedies by distress and entry; it is therefore impossible that they can all be made available, one distress would have the effect of rendering the property tenantless. The state of things at present is this:—the houses are abandoned and falling into ruin, and there is nothing on the premises to distrain on, and no available remedy for any of the grantees of the rent-charges. The jurisdiction of Courts of Equity to lend their aid, wherever there are difficulties in the way of the legal remedies (*b*), is clearly settled, and the rent-charge being an incumbrance on the estate, the Court, if necessary, will raise the arrears by sale

(*a*) 22 *Beav.* 72.

(*b*) *See* 6 *Ves.* 73; 13 *Price*, 734; *Ll. & Go.* 81, *note*, *and* 1 *C. P. Cooper*, *p.* 363, *note*.

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sale of the estate itself, as was done in *Cupit* v. *Jackson* (*a*).

Mr. *Shebbeare* for the Defendant. The Court cannot sell this estate for the payment of the arrears of rent-charges created with limited remedies. The grantees' rights are defined by their deeds, which are mere grants with powers of distress and entry, and nothing more. This is an attempt to extend the legal rights and remedies of the grantees, and to alter the contract between the parties. In *Cupit* v. *Jackson* the Chief Baron relied on *The Duke of Leeds* v. *The Corporation of New Radnor* (*b*), but that case does not bear out the decision. *Cupit* v. *Jackson* has frequently been disapproved of, the Vice-Chancellor of *England* in *Graves* v. *Hicks* (*c*) would not follow it, and it is also questioned in *Jarman's Bythewood* (*d*). In *Phillips* v. *Phillips* (*e*), a testator devised his real estates to trustees in fee, on trust, out of the rents, issues and profits, to pay certain life annuities, and by sale or mortgage to raise money for payment of his debts, &c., and then to settle the estates to the use that the annuitants should receive their annuities out of the same premises, with powers of distress and entry, and, subject thereto, to one for life, with remainder over, Lord *Langdale* held, that the annuitants were not entitled to be paid the arrears out of the corpus, though the rents were insufficient to keep down all the incumbrances.

Secondly. The Plaintiff cannot represent the absent grantees in a proceeding which seeks to destroy their rent-charges, and to substitute a charge on the purchase-

(*a*) 13 *Price*, 721, *and M'Cleland*, 495.
(*b*) 2 *Bro. C. C.* 338, 518.
(*c*) 11 *Simons*, 554.
(*d*) *Vol.* 1, *p.* 628, (*a*) (2nd edit.)
(*e*) 8 *Beav.* 193.

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chase-money for their right upon a real estate. The absent parties will not be bound by the decree, and a good title cannot be made to a purchaser under it.

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I think I am bound by the case of *Cupit* v. *Jackson*, and that I cannot avoid following it, notwithstanding any observations in the text books as to the inconvenience. The Vice-Chancellor of *England*, in *Graves* v. *Hicks*, thought that the Court would not, as matter of discretion, raise the arrears of a rent-charge by a sale, until there was a tenant in fee simple in possession of the estate charged. He said, the arrears must be paid some time or other, but that he had in that case no *constat* that they might not be paid out of the future rents.

Here there are perpetual rent-charges issuing out of the fee vested in the Defendant. When are the arrears to be paid? In ten or even twenty years hence it will be exactly the same question, and the observation of the Vice-Chancellor of *England* as to the fee simple falling into possession has occurred. Therefore the future state of circumstances cannot be different from the present. Here is a series of deeds creating twenty-one rent-charges, and it is shewn that they cannot be paid out of the rents and profits. Am I to allow the owner to leave them unpaid and the land to lie waste? If one grantee should attempt to make a distress, it would make the property unavailable for the future payment of the rent-charges; for the tenants would leave, the property would become uninhabited, and of no value to any one. If therefore it cannot be made available by letting, it must be by sale.

I do

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I do not feel pressed by the objection that the other grantees are not parties; their rights are the same as the Plaintiff's, and they must be served, and I must make the best title I can.

I must inquire who are entitled to the rent-charges, direct an account of the arrears and a sale of sufficient to pay the arrears and costs, and continue the receiver.

NOTE.—See *Nash* v. *Flyn*, 1 *Jones & L.* 162; *Stamper* v. *Pickering*, 9 *Simons*, 176; *Bensley* v. *Burdon*, 2 *Sim. & St.* 519; *Fay* v. *Fay*, 5 *Law Rec.* (*N. S.*) 198; *Manly* v. *Hawkins*, 1 *Dr. & Walsh*, 363; *Roberts* v. *Hughes*, *Beatty*, 426.

AUDSLEY *v.* HORN.

Nov. 12, 13. *Dec.* 4.

Bequest of leaseholds to *A.* for life, and at her death, to *B.* and her children; but if they should die without issue, to *C.* *B.* had no children at the death of the testator or in the life of *A.* *Held*, that *B.* took for life, with remainder to her children.

Semble, that *Wild's Case* (6 *Co. Rep.*) does not apply to personalty.

THE testator, being entitled to a leasehold property in *Hansard Place*, for the residue of a term of ninety-five years, by his will expressed himself in these words:—

"I leave *Hansard Place, Blackfriars*, to my daughter *Mary Rossiter* during her life, and at her death to her daughter *Amelia Rossiter* and *Amelia Rossiter's* children; but if they should die without issue, in that case the property to be divided between *William Hansard*, *John Tuttle* and *John Larry*, and *Maria Larry*."

The testator died about the year 1818. In *July*, 1834, *Amelia Rossiter* married *Joseph Horn*, and in *December*,

Where both a parent and his children are objects of a bequest of personalty, the tendency of modern decisions is, to construe the limitations as a gift to the parent for life, with remainder to his children.

In a foreclosure suit, the parties to the mortgage deed and those claiming under them ought alone to be made parties.

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December, 1834, *Horn* and his wife mortgaged the property to *Audsley*.

Mary Rossiter died in *January*, 1835, at which time there was no issue of *Amelia Horn*.

Horn died in 1857, leaving six children by his wife *Amelia*.

The question in this suit, which prayed both a declaration of rights and a foreclosure, was, what interest *Amelia Horn* and her children took in the property under the above bequest.

Mr. *R. Palmer* and Mr. *Cory* for the Plaintiff. First, this bequest to *Amelia Rossiter* and her children, and if they should die *without issue*, over, gives a *quasi* estate tail to her, on the authority of *Wild's Case* (*a*), where it was held, that a devise to *B.* and to his children or issue, *B.* having no issue at the time of the devise, is an estate tail, otherwise where he has issue at the time. *Wild's Case* is applicable to personal estate; *Stokes* v. *Heron* (*b*), and a *quasi* estate tail is equivalent to an absolute interest in personalty; *Chandless* v. *Price* (*c*). Secondly. She took concurrently with her children in joint tenancy; and there having been no child living when the estate fell into possession, she took the whole, for the interests of joint tenants must vest at the same time.

Mr. *Fischer*, for Mrs. *Horn*, submitted to a decree, but he objected that the evidence entered into by the Plaintiff was unnecessary, his title being admitted by Mrs. *Horn*.

Mr.

(*a*) 6 *Rep.* 17. (*b*) 12 *Cl. & Fin.* 179. (*c*) 3 *Ves.* 98.

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Mr. *Eddis* for the children. The principle of *Wild's Case* is inapplicable to personal property; *Heron* v. *Stokes* (*a*); *Buffar* v. *Bradford* (*b*); *Store* v. *Maule* (*c*); *Snowball* v. *Procter* (*d*). The reason of the rule is stated in *Jarman on Wills* (*e*), and it is shewn (*f*) that no necessity exists for applying it to personalty. If *Wild's Case* be applicable, still the words of this bequest are, "if *they* shall die without issue," that is, if *Amelia* and her children should die without issue, and this would confer a *quasi* estate tail, not only on the mother, but on her children also.

Secondly. The effect of this limitation is to give an estate for life to the mother, with remainder to her children. Such is the tendency of modern decisions, and was most probably the intention of the testator; *Goldney* v. *Crabb* (*g*); *Gordon* v. *Whieldon* (*h*); *Dawson* v. *Bourne* (*i*); *Jeffery* v. *De Vitre* (*k*); *Jarman on Wills* (*l*). *Doe* v. *Bradley* (*m*) was also cited.

Mr. *Cory* in reply.

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Dec. 4.

This is a suit to foreclose mortgage securities dated the 6th *December*, 1843, and the 24th of *March*, 1852. As an ordinary rule, nothing can be well determined, in such a suit, but the validity or invalidity of the mortgage, and the parties to the mortgage deed, or those claiming under them, should alone be parties to the cause.

(*a*) 2 *Dru. & W.* 101.
(*b*) 2 *Atk.* 220.
(*c*) 2 *Simons*, 490.
(*d*) 2 *Y. & C. C.* 478.
(*e*) *Vol.* 2, *page* 327.
(*f*) *Page* 334.
(*g*) 19 *Beav.* 338.
(*h*) 11 *Beav.* 170.
(*i*) 16 *Beav.* 29.
(*k*) 24 *Beav.* 296.
(*l*) *Vol.* 2, *page* 334 (*2nd ed.*).
(*m*) 16 *East*, 399.

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cause. But, by a species of arrangement, or at least by a proceeding on the part of the Plaintiff, acquiesced in by the Defendants, persons not parties to the mortgage are made Defendants to the bill, for the purpose of arguing and having determined a question arising upon the will of *Thomas Hansard*, as to what estate or interest *Amelia Rossiter* took in certain leaseholds, which are the subject of the mortgage, and which were bequeathed to her by the testator. Whatever her interest was, the whole of that interest has been mortgaged to the Plaintiff and is the subject of his mortgage.

The words of the will, so far as they relate to this subject, are these:—"I leave *Hansard Place, Blackfriars*, to my daughter *Mary Rossiter* during her life, and at her death to her daughter *Amelia Rossiter* and *Amelia Rossiter's* children; but if they should die without issue, in that case the property to be divided between *William Hansard*, *John Tuttle*, and *John Larry* and *Maria Larry*."

The question is, what estate these words gave to *Amelia Rossiter*. The gift is to her and her children, but if they should die without issue, then over. *Amelia Rossiter* had no children at the date of the will, or at the date of the testator's death, or at the date of the death of *Mary Rossiter*, and it is contended, that this is either a quasi estate tail in *Amelia Rossiter*, upon the principle of *Wild's Case* (a), or that it is an estate to *Amelia Rossiter* and her children as joint tenants, and that upon the latter assumption, as there was no child alive at the time when the gift took effect, *Amelia Rossiter* took the whole absolutely.

I think that *Wild's Case* does not apply here. The devise

(a) 6 Rep. 17.

devise there, according to the report in 6 *Rep.* 17, was to *Rowland Wild* and his wife, and after their decease to their children. Here the gift is to *Amelia Rossiter* and her children, but if they should die without issue, then over, and this distinction seems to have been commented on in the case of *Stokes* v. *Heron* (*a*), at least according to *St. Leonards'* note of that case in his comments upon the decision of the House of Lords (*b*). But I have not been able to find any case, except that of *Stokes* v. *Heron*, where it has been laid down, or even stated *obiter*, that the rule in *Wild's Case* applied to personal estate. In the case of *Stokes* v. *Heron*, this point was not decided by the House of Lords, although Lord *Brougham* expressed his opinion to that effect strongly; he thought that the rule applied equally to personal estate as well as to real estate. But it should be observed, that it was not necessary for the decision in that case, and that the applicability of this rule to bequest of personalty has been disputed in a great variety of cases, such as *Knight* v. *Ellis* (*c*); *Buffar* v. *Bradford* (*d*), and *Stone* v. *Maule* (*e*).

Upon a review of the whole of the cases upon this subject, I think that, setting aside some contradictory decisions, which it is not very easy to reconcile, the tendency of modern decisions has been, in cases like the present, to hold that, in personalty, the bequest gives an interest for life to the mother, with an interest in remainder to the children. Thus in *Crawford* v. *Trotter* (*f*), a bequest to one and her children was held to give an interest for life to the mother, with remainder to her children; and in *Morse* v. *Morse* (*g*), a bequest of a sum

(*a*) 12 *Cl. & Fin.* 183.
(*b*) *Page* 236.
(*c*) 2 *Bro. C. C.* 570.
(*d*) 2 *Atk.* 220.
(*e*) 2 *Sim.* 490.
(*f*) 4 *Mad.* 361.
(*g*) 2 *Sim.* 485.

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a sum of money to the testator's daughter and her children was held to give an interest for life in the daughter, with remainder to all her children.

I certainly cannot say, that cases are not to be found in the books which it is not easy entirely to reconcile with this view of the subject; but I think that the view I have stated is that which is most consistent with the line of modern cases and their tendency, and generally most in accordance with the spirit and intention of the testator in these cases. I also find that I have, upon two former occasions, adopted the same view, viz. in *Dawson* v. *Bourne* (*a*), and in *Jeffery* v. *De Vitre* (*b*).

In this case, certainly, I am of opinion, that the bequest must be construed to give a life interest to *Amelia Rossiter* only, and that upon her death the leaseholds are to be divisible among her children; consequently, all the Plaintiff is entitled to foreclose is, the life interest of *Amelia Horn*, formerly *Rossiter*.

Therefore, as against the Defendants who have been added by amendment, the bill must be dismissed, both because they are not parties to the mortgage deed, and also because the only question on account of which they have been made parties has been decided in their favor.

As against the Defendant *Amelia Horn*, I must make the usual decree for foreclosure, but I am of opinion I must accede to the application of Mr. *Fischer* upon the subject, and except from that decree the costs of the evidence gone into by the Plaintiff, which, as against the Defendants added by amendment, who are not affected

(*a*) 16 *Beav.* 29. (*b*) 24 *Beav.* 296.

affected by the mortgage deed, was unnecessary, and as respects the Defendant *Amelia Rossiter*, afterwards *Amelia Horn*, was improper, as she admitted, without qualification, the full title of the Plaintiff. In truth, all this evidence was gone into for the sole purpose of proving the case of the Plaintiff as against the other Defendants, who had either not admitted, or were incapable of admitting, the facts alleged by the Plaintiff. But as against the Defendant *Amelia Horn*, the expense of this evidence cannot be allowed, for she admitted the facts alleged; and as against the other Defendants it cannot be allowed, inasmuch as the bill of the Plaintiff wholly fails against them, and they are accordingly entitled to have it dismissed. In other respects, there must be the usual decree for foreclosure.

I do not think it will be right that I should make any declaration upon the subject unless the Defendants ask it.

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EVANS *v.* ANGELL.

Dec. 17, 20.

A testator devised all the freeholds to which he might be entitled at his decease, "situate in the parish of *C.*, with their appurtenances:" *Held*, it did not pass pieces of land in two other parishes, which had always been let with the lands in *C.* as one farm, and occupied by the same tenant.

As to what extent extrinsic evidence is admissible in such a case.

THE testator *Benedict John Angell* died in 1856.

By his will, he "gave and devised all the freehold, copyhold and leasehold messuages, lands, tenements and hereditaments to which he might be entitled at his decease, situate in the parish of *Crowhurst*, in the county of *Surrey*, *with their appurtenances*, unto and to the use of" four trustees, their heirs and assigns, upon trust for the Plaintiff for life, and after his decease upon trust for his first and other sons.

The testator, at the time of his decease, was seised in fee simple of an estate in the parishes of *Crowhurst*, *Limpsfield* and *Lingfield*, in the county of *Surrey*, consisting of about one hundred and four acres of land, of which ninety-three acres were in the parish of *Crowhurst*, two acres in *Limpsfield* and eight and a half acres in *Lingfield*. The question was, whether the land in the parishes of *Limpsfield* and *Lingfield* passed under this devise.

The solicitor of the testator, in his evidence, stated as follows:—"The testator was well aware of the fact, that his estate was situate in the three parishes of *Crowhurst*, *Limpsfield* and *Lingfield*, and was accustomed, when speaking of the above-mentioned estate, to call it '*Crowhurst*' or the '*Crowhurst* Estate.'"

The witness said, he believed the testator, in the above devise, intended to include the lands and hereditaments held and occupied therewith, situated in the parishes of *Limpsfield* and *Lingfield*. He said, that the said lands and

and hereditaments had always hitherto been let as one farm and occupied by one and the same tenant.

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Mr. *R. Palmer* and Mr. *De Gex*, for the Plaintiff, argued, that the lands in question passed by the devise.

Mr. *Lloyd*, Mr. *Jessel*, Mr. *G. L. Russell*, Mr. *Bird* and Mr. *Turner*, *contrà*, argued that parol evidence of intention was inadmissible; and, secondly, that these words were not sufficient to pass the adjoining lands in different parishes; *Doe* v. *Chichester* (*a*); *Ricketts* v. *Turquand* (*b*); *Horwood* v. *Griffith* (*c*); *Boocher* v. *Samford* (*d*); *Newton* v. *Lucas* (*e*); *Hobson* v. *Blackburn* (*f*); *Gauntlett* v. *Carter* (*g*).

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My present impression is, that this devise will not carry the property in *Limpsfield* or *Lingfield*. He devises "all the freeholds," &c. &c. "to which he might be entitled at his decease, situate in the parish of *Crowhurst*, in the county of *Surrey*." If it had stopped there, there would be an end of the question; the cases are too strong. If he had said "the *Crowhurst* estate," it would be treated in a different manner. But he adds "*with their appurtenances*," that is, with the appurtenances to his lands "situate in the parish of *Crowhurst*." On looking at the map, it appears that there is only one piece of land in *Lingfield*, which is adjacent to the *Crowhurst* property, and which just touches it. There are two other pieces, a good way off, in the parish of *Lingfield*, and four other pieces of land, at

(*a*) 4 *Dow.* 65.
(*b*) 1 *H. of L. Cas.* 490.
(*c*) 4 *De G., M. & G.* 700.
(*d*) *Cro. Eliz.* 113.
(*e*) 6 *Sim.* 54; 1 *Myl. & Cr.* 391.
(*f*) 1 *Myl. & K.* 571.
(*g*) 17 *Beav.* 586.

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at a distance in *Limpsfield*. None of these actually adjoin the *Crowhurst* property except one, and it is very difficult to say, that they are appurtenant, in the ordinary sense of the word, to lands in *Crowhurst*.

I will look at the decisions as to the word "appurtenances," and also consider what extrinsic evidence is properly admissible. *Primâ facie* evidence of intention would not be admissible.

From the evidence, it is highly probable the testator intended to pass "the *Crowhurst* estate," but he has only devised the lands "to which he might be entitled at his decease situate in the parish of *Crowhurst*."

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Dec. 20. So far as this depends on anything but the word "appurtenances," it is clear, that the pieces in the two adjoining parishes do not pass. Some doubt might have arisen, if he had called it "his *Crowhurst* estate," but as he devises his lands, &c. "situate in the parish of *Crowhurst*," on these words it is clear, that the outlying pieces would not pass. The authorities on this point are clear, and the distinction is taken in *Ricketts* v. *Turquand* (*a*), where the Lord Chancellor, in the course of his judgment, says, "If he (a testator) describes lands in a particular parish by a particular name, or in a particular locality, you cannot go into evidence to shew he meant, by the general appellation, to include something out of it; you cannot do that without contradicting the express terms used. Here is a term which included more or less land, according

(*a*) 1 *H. of L. Cas.* 490.

cording to what was meant by the term used, and all we are in search of is the particular meaning of the expression which is used. It does not appear to me that we have found that upon this will, and that there is not the least doubt that the Master of the Rolls has come to a right conclusion." This is consistent with the other authorities, *Doe* d. *Oxenden* v. *Chichester* (*a*).

Therefore, if these pieces of land pass at all, they must do so under the word "appurtenances." This is a question of another character, and depends, to some extent, on a different class of cases, and requires a separate examination. In the first place, it is to be observed, that the word here is simply "appurtenances," not "lands appertaining to," or any equivalent words. It must, therefore, be distinguished from that class of cases which rest on such words. This distinction is taken in *Hearn* v. *Allen* (*b*)—[*His Honor stated it.*]

The word "appurtenances" has a distinct and definite meaning, and though it may be enlarged by the context, yet the burthen of proof lies on those who so contend. *Primâ facie*, it imports nothing more than what is strictly appertaining to the subject matter of the devise or grant, and which would, in truth, pass without being specially mentioned. The cases in which the word "appurtenances" used in a will has been extended beyond this are not few, but I think that they all rest on peculiar circumstances belonging to each case. The first case is *Boocker* v. *Samford* (*c*), there the description was held to mean all that *H. B.* occupied, and as the

(*a*) 4 *Dow.* 65.
(*b*) *Cro. Car.* 57.
(*c*) *Cro. Eliz.* 113.

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the rent was increased, and as it all passed by one grant, this seemed to be reasonable. The next case is *Doe* d. *Lempriere* v. *Martin* (*a*)—[*His Honor stated it*]—There it appeared that the testator had actually laid the ground in question into and made it a part of the court yard of the house devised. I think it must be held, that this was property made by him an "appurtenance" to the house devised. It is true, that this was held under a different title, but this I think will not get over the other very material circumstance. It decided nothing more than, that by the words, "outhouse, garden and appurtenances belonging to the messuage," the whole of the court yard passed.

The next case is *Buck* d. *Whalley* v. *Nurton* (*b*), where the question was whether sixty-four acres passed under a devise of house and the lands held and enjoyed therewith with the appurtenances.

These are the cases which principally bear on this subject; there are, however, some other cases which bear indirectly on this point, the first is *Hobson* v. *Blackburn* (*c*); the next is *Arkell* v. *Fletcher* (*d*), which is a stronger case than the one before me.

There is a still further class of cases which must be distinguished from those to which I have already referred, where the words are not simply "appurtenances," but "lands appurtenant" or "lands appertaining thereto," and the like. They rest on a totally different footing, and if these had been the words used here, I should have held, on the authority of *Ongley* v. *Chambers* (*e*), *Doe*

(*a*) 2 *W. Bl.* 1143.
(*b*) 2 *P.* 53.
(*d*) 10 *Sim.* 299.
(*e*) 1 *Bing.* 483.

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Doe d. *Gore* v. *Langton* (*a*), and that class of cases, that the outlying pieces of land in the adjoining parishes would have passed, but here the word is simply "appurtenances." *Primâ facie*, that must be held to have the restricted meaning of appurtenant to the lands devised, and I find nothing in the will to extend that construction.

I think it unnecessary to say anything about the admission of extrinsic evidence, because, after it is admitted, my opinion remains the same, but the only evidence which could be properly admitted here is the evidence of the position and situation of these lands, and the manner in which they were held by and under the testator.

I retain the opinion which I expressed at the hearing, that the outlying pieces of lands in the two adjoining parishes of *Limpsfield* and *Lingfield* do not pass under the words of this devise.

(*a*) 2 *B.* & *Ad.* 680.

In re WARD'S LEGACY.

Dec. 21.

Bonâ fide sale of bankrupt's property by the creditors' assignee alone, without the concurrence of the Official Assignee, *held* valid.

UNDER the will of a testator who died in 1847, the Petitioner *Samuel P. Ward* was entitled to a legacy of 1,400*l.* contingently on his surviving his wife. He had, in 1855, mortgaged the legacy to the *Edinburgh* Life Insurance Company for 500*l.*, and also to a Mr. *Brown*. He was declared bankrupt in *April*, 1857, and Mr. *Roffe* was appointed creditors' assignee, and Mr. *Patrick Johnson* official assignee.

In *January*, 1858, *Samuel P. Ward* obtained his certificate, and the insurance company, to whom 500*l.* and

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and a considerable arrear of interest was due, having threatened to sell the contingent legacy, *Samuel P. Ward* entered into a negociation with Mr. *Roffe*, the creditors' assignee, for the purchase of the assignees' interest therein. That interest was valued by an actuary at 616*l.* and the mortgages on it amounted to about 600*l.*

Ultimately, *Roffe* signed an agreement, dated the 9th of *February*, 1858, for the sale of that interest to *Samuel P. Ward* for the sum of 35*l.*, payable on the 10th of *July*, 1858. The official assignee did not join in the contract.

The Petitioner's wife Mrs. *Ward* died on the 10th of *March*, 1858, and the legacy then became payable to *Samuel P. Ward* and his assignees.

On the 9th of *July*, 1858, *Samuel P. Ward's* solicitor produced the agreement and tendered the purchase-money of 35*l.* to Mr. *Patrick Johnson*, the official assignee, but he refused to receive it, on the ground that the sale had not been concurred in or consented to by him or by the commissioner, and therefore was not binding on him. Thereupon, *Samuel P. Ward*, on the 10th of *July*, 1858, tendered the sum of 35*l.* to Mr. *Roffe*, who accepted the same and indorsed a receipt on the agreement.

Samuel P. Ward having given notice of the agreement to the trustees of the fund, they paid it into Court under the Trustee Relief Act. *Samuel P. Ward* now presented a petition praying that his mortgagees might be paid out of the fund, and that the surplus might be paid to him.

Mr.

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Mr. *R. Palmer* and Mr. *Parker*, in support of the petition, relied on *Hughes* v. *Morris* (*a*), where it was held by Sir *George Turner*, that the official assignee was bound by contracts entered into by the company's assignees. They also referred to 12 & 13 *Vict.* c. 106, ss. 40, 49.

Mr. *Bagshawe* and Mr. *Parker*, for Mr. *Roffe*.

Mr. *Speed* and Mr. *Sheffield*, for mortgagees.

Mr. *Wickens*, for the trustees.

Mr. *Higgins*, for the official assignees, argued, first, that a contract entered into by the trade assignee alone was not binding; and, secondly, that this was not such a contract as the Court would enforce, being a purchase of a reversionary interest for a small sum, payable at a future period.

The MASTER *of the* ROLLS held, that the contract of the creditors' assignee was binding and not affected by the early death of the tenant for life. That having been entered into after negotiation and valuation, and not being impeached on the ground of fraud or any inadequacy of consideration, it must be acted on, and that the order must be made as prayed.

(*a*) 9 *Hare*, 645.

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SMITH *v.* ACTON.

Dec. 17.

A testator died in 1818. *A. B.*, his administrator, received assets and placed them in a bank, to an account—"*A. B.*'s trustee," and where they still remained. *A. B.* died in 1853, and to a suit, instituted by the administrator *de bonis non* of the original testator against the representatives of *A. B.* and the bankers, to recover the fund, the representatives of *A. B.* set up the Statute of Limitations, but the bankers were willing to pay the amount:—*Held*, that the statute was inapplicable, and a decree was made for the Plaintiff.

Held, also, that in such a suit, the representatives of *A. B.* could not be charged with interest.

WALTHALL RIDGWAY SMITH died in 1818, and letters of administration, with his will annexed, were, in 1821, granted to *John Acton*. His children were entitled to his residuary estate. *John Acton* got in certain personal estate and effects of the testator, and thereby realized the sum of 600*l.*, which he paid into the bank of Messrs. *Kinnersley* & Co. to an account intituled "Mr. *John Acton's* trustee, 600*l.*" This sum had not been since dealt with, but still remained in the bank at interest, at 2*l.* per cent. and with its accumulations it now amounted to the sum of about 1,060*l.*

In 1852, the children of the testator applied to *John Acton* for an account of their father's estate, and a correspondence ensued between him and their solicitors, which produced no result; in the course of the correspondence, however, it was stated, that the money was in the hands of Messrs. *Kinnersley*, the bankers.

John Acton died in *August*, 1853. After his decease, administration *de bonis non* of the estate and effects of *Walthall Ridgway Smith* was granted to the Plaintiff, who instituted this suit in 1858 against the representatives of *John Acton* and a Mr. *Meigh*, (the representative of the surviving banker,) praying a declaration, that the sum of 1,060*l.* formed part of the estate of *Smith*, and that *John Acton* held the same in trust for the persons entitled to the personal estate of the testator. That the principal sum paid into the bank of *Kinnersley*

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Kinnersley & Co., together with interest thereon at 5*l.* per cent. with annual rests, ought to be paid to the Plaintiff, as the legal personal representative of the testator *Smith*, to be administered by him. That the sum of 1,060*l.* with interest from the 28th of *February*, 1853, might be paid to the Plaintiff by the Defendant *Meigh*, and that the difference between what should be paid by *Meigh*, and the amount of the said principal and interest with annual rests, might be paid to the Plaintiff by the other Defendants.

The bill alleged, "that *John Acton* was a trustee for the Plaintiff and the other residuary legatees, as to the said sum of 1,060*l.* paid by him into or left by him in the hands of Messrs. *Kinnersley*, and that the Plaintiff and the other residuary legatees of the testator were entitled to the sum of 1,060*l.*, together with interest thereon, as part of the clear residuary estate of the testator appropriated by *John Acton*, for such residuary legatees."

"That although the 1,060*l.* was or is standing in the name of *John Acton*, it formed no part of his estate, but was and is part of the personal estate of the testator *Walthall Ridgway Smith*, as the said *John Acton* had acknowledged."

The representatives of *John Acton* relied on the Statute of Limitations, and insisted that he was not a trustee for the residuary legatees.

Mr. *Meigh* admitted payment into the bank of three sums of money, in 1827, 1831 and 1833, to the credit of *John Acton*, and which, with interest, now amounted to 1,027*l.*, and he was willing to pay it, on receiving a sufficient acquittance and discharge for the same.

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Mr. *R. Palmer* and Mr. *Sidney Smith*, for the Plaintiff, argued first, that this was a trust fund and was ear-marked, that it now belonged to the representatives of *Smith*, that the Statute of Limitations was inapplicable, and that the case had been taken out of the statute by the correspondence.

Mr. *C. Swanston*, jun., for *Acton's* executors, argued that the claim was barred by the statute, and that the case had not been taken out of the operation of the statute by what had occurred.

Mr. *John Stuart*, for *Meigh*, submitted to act as the Court might direct, and asked for his costs.

As to the Statute of Limitations, the following cases were cited:—*Stansfield* v. *Hobson* (*a*); *Tullock* v. *Dunn* (*b*); *Rackham* v. *Marriott* (*c*); *Prance* v. *Sympson* (*d*); *Morrell* v. *Frith* (*e*); *Grenfell* v. *Girdlestone* (*f*).

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I think there has been some confusion during the argument, which makes it necessary to distinguish between two classes of cases. If the 1,060*l.* had been mixed up with the estate of *John Acton*, instead of being separated from it, it would then have been necessary to have an account of *Smith's* estate as against the representatives of *Acton*, and if it were made out that *Acton* had retained the money and had used it for his own benefit, his estate might be charged with interest, with or without annual rests. In such a suit the Statute

(*a*) 3 *De G., M. & G.* 620.
(*b*) *Ryan & M.* 416.
(*c*) 2 *Exch. Rep.* 196.
(*d*) *Kay*, 678.
(*e*) 3 *Mac. & W.* 402.
(*f*) 2 *Y. & C.* (*Exch.*) 662.

Statute of Limitations (*a*) would be properly pleadable, and the question which has been argued of a subsequent promise to pay would then arise.

But if the fund does not belong and never did belong to *Acton's* estate, but was part of *Smith's* estate deposited with Messrs. *Kinnersley*, and the object be simply to recover it from Mr. *Meigh*, then the estate of *John Acton* could not be charged with interest and the Statute of Limitations as regards his representatives would not be applicable. The cases are separate and distinct. It is therefore properly charged in the bill, that this money is part of *Smith's* estate, separated and in the hands of Mr. *Meigh*, who is a mere stakeholder. The question which arises is simply this:—To which of the two estates does it belong? that once decided, then it follows that the persons entitled to that estate are entitled to the money. I stopped the argument as to the Statute of Limitations, treating this fund as in the hands of Mr. *Meigh*, who is the only person who could properly set up that defence, and who might say "I am entitled to it as against all the world." But Mr. *Meigh* does not raise that contention; he disclaims all interest in it; the fund therefore belongs to one of the two estates, and there is a clear admission on the part of *John Acton*, that it did belong to, and was solely derived from, *Smith's* estate.

The Plaintiff is entitled to a decree for the money. I cannot give the *Actons* any costs, but Mr. *Meigh* must have his costs, for he is a mere stakeholder.

(*a*) *See* 3 & 4 *Will.* 4, *c.* 27, *s.* 40.

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Re The DEAN AND CHAPTER OF WESTMINSTER.

Re The HAMPSTEAD JUNCTION RAILWAY COMPANY.

Nov. 13, 24.

A Railway Company took some lands belonging to an ecclesiastical corporation, which at the time was let on lease, and a large sum was awarded as a compensation, on the principle of the lessee continuing to pay the rent reserved by his lease. The land being valuable for building purposes, and it being the custom of the corporation to make it available, by accepting surrenders and re-granting building leases at a great advance of rent, the Court, on the evidence, *held*, that the corporation was entitled to the dividends on the compensation money, in addition to the rent during the term granted by the lease.

THE above railway company had, under the powers contained in their acts (which incorporated the Lands Clauses Consolidation Act) (*a*), taken two pieces of land at *Hampstead*, belonging to the Dean and Chapter of *Westminster*.

The first consisted of about eight acres, which had been demised in 1808, for the lives of three persons, and of the survivor (all of whom were living), at a yearly rent of 1*l.* 12*s.* The second consisted of about one and a half acre, which was subject to an agreement dated in 1855, for a demise thereof, with other lands, for ninety-nine years, at an aggregate yearly rent of 231*l.* 10*s.*

The Arbitrators, duly appointed, awarded to the Dean and Chapter the sum of 3,300*l.*, for the absolute purchase of their estate and interest in the eight acres of land, subject to the lease of 1808, and the further sum of 105*l.* for the absolute purchase of their estate and interest in the one and a half acres, subject to the agreement of 1855, and 3,700*l.* by way of compensation for the damage or injury sustained or to be sustained by the Dean and Chapter, by reason of the execution of the works of the Company, and of the severing of the lands from their other lands, or otherwise injuriously affecting such other lands, by making the tunnel, railway

(*a*) 8 & 9 *Vict. c.* 18.

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way and works. And the arbitrator stated, in his award, that he had fixed the above amounts on the principle, that the lessees were to continue to pay the whole of the rents reserved by the lease of 1808 and by the agreement of 1855 to the Dean and Chapter during the residue of the terms.

The three sums, with interest, amounting to 7,632*l.* 1*s.* 3*d.*, having been paid into Court, the Dean and Chapter now presented a petition, praying payment to them of so much of the fund as consisted of interest, and for payment to them of the dividends to accrue due, from time to time, on the remainder of the fund.

The question raised was, whether, under the Lands Clauses Consolidation Act (*a*), the Petitioners were entitled, until the expiration of the terms of the leases of 1808 and 1855, to anything more than the rent stipulated to be paid by the lessees. The effect of this would be, to allow the income to be accumulated during those periods for the benefit of the successors.

There was evidence to the following effect:—that the Dean and Chapter of *Westminster* had, for many years past, refused to renew the leases held on lives, with a view of improving their property, by letting it out on building leases at the expiration of such leases, or by accepting surrenders of the leases, and regranting the land on building leases for ninety-nine years, under the powers of the act of 5 & 6 *Vict.* c. 108.

The affidavit then specified three instances, in which land adjoining that in question, held of the Petitioners for

(*a*) 8 & 9 *Vict.* c. 18, ss. 70—78.

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for lives, had been surrendered and building leases taken for ninety-nine years. One of these, consisting of forty-five acres, had been taken at a rental of 500*l.*, and an obligation to build to the value of 20,000*l.*; a second of twenty-one acres, at a value of 231*l.* 10*s.*, and a third of forty acres at a rental of 1,120*l.*

The witness stated, that from his professional knowledge of the value of land, he knew, that the price awarded by the arbitrator, as compensation for the eight acres, was awarded with especial reference to the capability of such land being turned to account as building land, and from the suitableness of its situation for such purpose, and the demand of building land in the immediate neighbourhood, an immediate market was rendered almost a certainty. He said that the Ecclesiastical Commissioners were willing to promote such arrangements, and that in all the aforesaid cases, the reserved rents, on granting leases for ninety-nine years, had, with the consent of the Ecclesiastical Commissioners, been wholly paid to the said Dean and Chapter of *Westminster*.

That in his opinion, the Petitioners, if the dividends on the fund should be paid to them, would only receive such benefit from the land as they might lawfully have had, if it had not been sold, but had been dealt with by surrender and regrant, under the powers of the act before referred to.

Mr. *R. Palmer*, for the Dean and Chapter, supported the application.

Mr. *Speed*, for the Company, argued, that the Petitioners were only entitled to the rents reserved by the leases until the expiration of the terms thereby granted

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and that the dividends must in the interim be accumulated.

The following cases were referred to:—*Ex parte The Dean and Chapter of Gloucester* (*a*); *Ex parte The Precentor, &c. of St. Paul's* (*b*); and see *In re Steward's Estate* (*c*).

The MASTER *of the* ROLLS.

On carefully reading over the evidence in this case, I am of opinion, that the value of the property was estimated as of a property in possession; and, fully adopting the principle of those cases which hold, that where a reversion is taken by a railway company, the persons entitled in possession shall only take so much of the dividends of the compensation-money as corresponds with the amount which they would have received if the land had remained unconverted, and that the rest is to accumulate for the purpose of making up, when the reversion falls into possession, the absolute value of the property, I am of opinion, that this is not a case of that description.

I think that, having regard to the evidence, to the mode of dealing with this property and the agreements that have been entered into for letting it on building leases, by obtaining the surrender of existing leases for lives for that purpose, this case must be treated as one in which the property has been bought as in possession, and I consequently think that the Dean and Chapter of *Westminster* are entitled to the dividends upon this fund.

I have looked at, and concur in, the cases upon this subject, and I do not mean to disturb them by what I now state.

(*a*) 19 *Law J.* (*N. S.*) *Ch.* 400.
(*b*) 1 *Kay & J.* 538.
(*c*) 1 *Drew.* 636.

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NEWMAN *v.* NEWMAN. (No. 1.)

Nov. 8.

South Sea Stock and £3 : 5*s.* per Cents. *Held*, on the context, to pass by the expression "surplus money."

A testatrix bequeathed specific sums of *South Sea* Stock and £3 : 5*s.* per Cents. to her sister for life, and, at her death, she left "this money in trust to her niece," to pay certain legacies, which did not exhaust the whole. She authorized her sister and niece (who were her executrixes) to sell out the residue of "her money" in the £3 : 5*s.* per Cents. over the sum she had mentioned, for payment of her debts, and proceeded: "then, if there is any surplus money, I give it to my niece:"—*Held*, that the niece took the surplus of both the funds.

THE testatrix *Lucy Hibbert* bequeathed as follows:—"To my dear sister, Mrs. *Ann Newman*, I leave the interest of 2,777*l.* 4*s.* in the *South Sea* Stock and 2,650*l.* in the £3 : 5*s.* per Cents. for her sole use during her life, and at her death I leave *this money* in trust to my niece *Lucy Newman* to pay the following legacies:"—"To my niece *Lucy Newman* I leave 1,777*l.* 4*s.* in the *South Sea* Stock and 650*l.* in the £3 : 5*s.* per Cents." [She then gave other legacies of *South Sea* Stock and £3 : 5*s.* per Cents., but which did not exhaust the whole, and proceeded as follows:]—"I do empower my sister Mrs. *Ann Newman* and my niece *Lucy Newman*, after my death, to sell out any of the residue of my *money* in the £3 : 5*s.*, *over the sum* I have mentioned, for the payment of my funeral expenses, probate of will and any debts I may owe; then, if there is *any surplus money*, I give it to my niece *Lucy Newman* for her sole use. I appoint my sister Mrs. *Ann Newman* and my niece *Lucy Newman* executrixes."

The question was, whether there was any intestacy in respect of the surplus of the *South Sea* Stock and £3 : 5*s.* per Cents.

Mr. *Bathurst*, for the Plaintiff: First. The testatrix having given *Lucy Newman* a specified portion of the two funds, it is inconceivable that she could have intended

tended her to take any further portion of them. 2ndly, the words "surplus money" will not pass the *South Sea* Stock or the £3 : 5*s*. per Cents.; *Ommanney* v. *Butcher* (*a*). 3rdly, the "surplus money" must be restricted to the residue of the £3 : 5*s* per Cents., which alone the testatrix authorized the sale of.

Mr. *Henry Stevens, contrà.*

The word "money" is sufficient to pass the stock; *Kendall* v. *Kendall* (*b*). The testatrix has interpreted her meaning of the word "money;" for, after referring to the two stocks, she says, I leave *this money* in trust to my niece *Lucy Newman;* the "surplus money" therefore means the whole surplus stocks, and there is no intestacy.

The MASTER *of the* ROLLS.

I think this will gives the whole surplus of the two funds to *Lucy Newman*. If the matter had stood on the last clause alone, I should have been disposed to adopt the construction contended for by Mr. *Bathurst*, and to hold that the residue of the £3 : 5*s*. per Cents. alone passed. But I observe that the testatrix, throughout her will, uses the words "money" as synonymous with "stock." After giving a life interest to her sister in the two stocks, she says, "and after her death I leave *this money*" to my niece in trust to pay certain legacies. I think this is a bequest of the two funds, subject to the payment of the legacies. Then, at the end of the will, she gives her niece "any surplus money." There is, therefore, a gift originally to the niece of both funds as money, and a beneficial gift to her at the end of "any surplus money." I think she is entitled to the surplus of both funds.

(*a*) *Turn. & Russ.* 260. (*b*) 4 *Russ.* 360.

1858.

NEWMAN *v.* NEWMAN. (No. 2.)

Nov. 8.

Bequest of "all my household furniture and effects, plate, linen, china, glass, books, wearing apparel, *et cætera*," *held* to pass the articles enumerated and others *ejusdem generis*, but not the general residue.

THE testatrix *Ann Newman* bequeathed "all her household furniture and effects, plate, linen, china, glass, books, wearing apparel, &c." to the Defendant *Lucy Newman*, and she appointed her sole executrix.

The testatrix died in 1855, and the question was, whether these words passed her general personal estate, or was confined to things *ejusdem generis?*

Mr. *Bathurst*, for the Plaintiff, argued that this will only passed "the household furniture" and the other articles enumerated, together with things *ejusdem generis*, and that there was an intestacy as to the rest of the testatrix's property. He cited *Cook* v. *Oakley* (*a*), and *Attorney-General* v. *Johnstone* (*b*).

Mr. *H. Stevens, contrà.* The words "*et cætera*" mean, and all the rest, and are sufficient to enlarge the previous word and pass the general residue. The words "&c." are introduced to save further enumeration of particular species of property, and mean strictly "and the rest;" *Kendall* v. *Kendall* (*c*). He also cited *The Marquis of Hertford* v. *Lord Lowther* (*d*).

The MASTER *of the* ROLLS.

I entertain no doubt that the words "&c." are to be confined to things *ejusdem generis;* I think it impossible to

(*a*) 1 *P. Wms.* 301.
(*b*) *Amb.* 577.
(*c*) 4 *Russ.* 370.
(*d*) 7 *Beav.* 1.

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to treat them otherwise, not only on the authorities, but on the plain meaning of these words, and the cases cited rather confirm than weaken that impression. The testatrix bequeaths "all my household furniture and effects, plate, linen, china, glass, wearing apparel." Stopping here, there is a mere gift of the chattels specified. Then come the words "*et cætera*," which means, "and all other things like the preceding."

The cases confirm me in this construction. *Kendall* v. *Kendall* (*a*) was a totally different case; the question there was, whether the words "*et cætera*" were to have the effect of cutting down other words, which were sufficient of themselves to pass the whole residue; but here the question is the reverse, and is, whether the same words are to enlarge the prior gift.

The *Marquis of Hertford* v. *Lord Lowther* (*b*) rather confirms my view. Lord *Langdale* held that Polish Bonds and Neapolitan Bordereau, being choses in action, did not pass under the words "goods and chattels at *Milan*," and that the words "*et cætera*" could only be extended to things which the testator possessed at *Milan*.

I am therefore of opinion, that there is an intestacy, except as to the articles specified in the will and those which are *ejusdem generis*.

(*a*) 4 *Russ.* 360. (*b*) 7 *Beav.* 1.

1858.

HARRIS *v.* COLLETT.

July 29.

As to the right of a Plaintiff in a bill of discovery, in aid of an action at law, to an injunction to restrain the action until full discovery is given.

Semble, that a *primâ facie* case must be shewn, and that the Court will not allow a contest on affidavit on a motion for such an injunction.

ON the 3rd of *February*, 1858, the Defendant, a draper and haberdasher, at *Brentford*, insured his stock in trade and fixtures in the *Phœnix Assurance Company*, for the sum of 1,500*l*. He shortly afterwards effected a similar assurance for the same sum in the County Fire Office.

On the 27th of *April*, 1858, a fire occurred on the Defendant's premises, which consumed his stock and fixtures, and in *May*, 1858, he delivered to the offices a summary of his losses, which he estimated at 2,706*l*., and he claimed a moiety from each. He sent in a more detailed account in *June*, and there being some doubt on the part of the company as to the propriety of his claim, they withheld immediate payment, and thereupon the Defendant commenced an action in *June*, 1858, against the *Phœnix* Company, to recover the amount of his claim.

The declaration was delivered on the 10th of *July*, and, on the 14th of *July* the company filed this bill of discovery. It alleged that the "Defendant had only for the last few years set up in business as a draper and haberdasher on his own account, having previously been in the employ of other persons at a small salary, and consequently that he had a small capital only embarked in his business; that his stock in trade on his premises, at the time of the fire, was of small value, and very much less than the sums in which they were insured by the two policies, and the same would appear if

if the Defendant would give the discovery thereby required of him." It alleged also, that his claim was based on the last stock taking in *December*, 1857, which it insisted was incorrect; that, contrary to the usual custom, the Defendant had concealed the stock book, instead of leaving it open to the inspection of his assistants. The bill required minute discovery as to goods, books, prices, his assistants in the business, &c. which, it alleged, tended to shew that the Defendant's claim was exorbitant, &c.

The bill also charged, that the value of the goods alleged by the Defendant to have been consumed by the fire far exceeded the value of the goods actually on the Defendant's premises at that time, or whichever had been on the Defendant's premises at any one time before the fire, and so the same would appear, if the Defendant would set forth and discover, as he ought to do, when his last balance-sheet previous to the fire was made up, and what was the amount of his returns for the year next preceding the time of making up such balance, and what was the amount of the gross profits of his business in such last-mentioned year, &c., &c. The bill prayed a discovery, and an injunction in the meanwhile.

Interrogatories had been delivered on the 17th, and filed on the 23rd of *July*, and the trial was expected to take place on the 2nd of *August*.

A motion was now made for an injunction to restrain the action until the Defendant had given the discovery required of him. The Plaintiffs, the secretary of the company and their solicitor, filed a short affidavit, stating their belief of the truth of the allegations in the bill, that they believed the Defendant's claim "fraudulent

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lent and excessive," that the suit was *bonâ fide*, and (in the usual form) that the answer would furnish discovery material to the defence of the action.

The Defendant filed a long affidavit, detailing the circumstances, the loss of his books by the fire, and what had since taken place between the parties. He said he believed the present application was to delay payment, but he in no way furnished the discovery required by the bill. There was also an affidavit of the accountant who had prepared the particulars of his claim, to shew that it had been *bonâ fide* prepared from the existing books.

Mr. *R. Palmer* and Mr. *Druce*, in support of the motion, relied on *Lovell* v. *Galloway* (*a*), in which case, they stated, the company had been successful before a jury, after obtaining the discovery so much resisted.

Mr. *Lloyd* and Mr. *Southgate* for the Defendant. The case is not governed by *Lovell* v. *Galloway*, for the Lords Justices, in *Fox* v. *Hill* (*b*), took a different view of the effect of 15 & 16 *Vict.* c. 86, and they discharged both the order made by this Court for the injunction and that which continued it. The Court must in these cases look at the circumstances as detailed in the affidavits, in the same way as other cases of special injunctions, to which they are assimilated by the statute. Here the circumstances do not justify the granting of an injunction. The Plaintiffs have had all the Defendant's books in their possession, and have fully investigated his claim, and

(*a*) 17 *Beav.* 1, *and* 19 *Beav.* 643; *and see Senior* v. *Pritchard*, 16 *Beav.* 473; *Chilton* v. *Campbell*, 20 *Beav.* 531; *Mollett* v. *Enequist*, 25 *Beav.* 609; *Magnay* v. *Mines Royal Company*, 3 *Drew.* 130.

(*b*) 2 *De G. & Jones*, 353.

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and, from the loss of documents by the fire, it is shewn to be impossible that any further discovery can be given. No discovery is necessary to prove the Plaintiffs' case; the *onus* of proof in the action lies on the Defendant, who must shew, to the satisfaction of the jury, every thing he has lost by the fire, and the extent of the injury. The proceedings of the Plaintiffs are not *bonâ fide*, their object is delay, and to throw the trial over the present assizes. Their great delay in coming to this Court is a sufficient ground for refusing an injunction. The statute 15 & 16 *Vict.* c. 86, s. 58, was intended to remedy the injustice done to Defendants (*a*) by the common injunction, which issued, as of course, upon the Defendant's default in not appearing or not answering, but here the Defendant is in no default, and he will be in a worse position since the statute than under the old practice, if the injunction be now granted, as of course, before the time for answering has expired.

The MASTER *of the* ROLLS.

It is of great importance that this question should be set at rest, and I strongly urge the Defendant to take the opinion of a higher tribunal upon the subject. But it appears to me that the question raised by the Defendant is simply this:—Whether, by the Act of Parliament, is was intended to put an end to the right to a discovery in aid of the defence to an action at law. It certainly was not and could not have been the intention of the legislature, that parties should go into a long conflict

(*a*) During the argument of the appeal in this case, Lord Justice *Knight Bruce* said, "I do not agree that the change of the law was meant only for the benefit of the Defendant; it was intended for the benefit of the Plaintiff also, as it enabled him to get, what used to be called, the common injunction, immediately on the filing of the bill, in the same way as he could get a special injunction."

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flict of affidavits, for the purpose of determining whether the Plaintiff in equity should have a discovery or not. In this case it is an admitted fact, on the one side, that the Plaintiffs know nothing at all about the matter, and it is that ignorance which induces them to come to the Court for discovery. On the other side, the Defendant must know all the facts, and I am asked to determine the merits upon affidavits, in order to decide whether the Defendant is or not bound to give to the Plaintiffs that discovery which they think essential for their defence to the action brought by the Defendant. If the right of the Plaintiff in equity to the discovery in aid of his defence to the action be not a matter of course, that right must be determined, like any other case of relief sought by a Plaintiff in equity, not on interlocutory motion, but the cause must be brought to a hearing; but before this is done (unless this case be made an exception) the Defendant would have been compelled to answer fully, and at the hearing there would be nothing to try except the right to that which had been already given. And if the Court did not by injunction restrain the trial of the action until the right to the discovery were determined, and, if determined in favour of the Plaintiff, until the discovery be also given, the Court would be guilty of the injustice of determining, that in a case where a good defence to the action brought by the Defendant depends on facts which are solely known by him, and though the Plaintiff in equity is entitled to have those facts disclosed to him, still that disclosure shall not be given until it is too late for him to make use of it. It is not a question of technicality, but one of substance; whether it was intended by the legislature that the Plaintiffs' right to a discovery was a matter to be determined on affidavit on the motion for the injunction. Speaking from my own personal knowledge, and from frequent conversations with the late Vice-Chancellor

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Vice-Chancellor *Parker*, and with the other members of the Chancery Commission, I can say that such was not the intention of the Commissioners, upon whose report to Parliament this bill was founded. I consulted the members of the commission upon the point before I decided *Lovell* v. *Galloway* (*a*), and I retain my opinion upon that subject.

If I were to say, that in consequence of the Defendant's affidavit, the Plaintiffs are not entitled to the discovery they seek, it is clear that I should give a discovery in no case whatever, and in every action the right of discovery in equity would be put an end to.

I am of opinion that the Plaintiffs are entitled to a discovery, and to an injunction until they have obtained it. This no doubt will occasion delay, but the Defendant will receive the costs of the discovery.

(*a*) 17 *Beav.* 1.

NOTE.—Upon appeal to the Lords Justices, it was arranged that the Defendant should put in a full answer before the 5th of *August*, and that the *venue* should be changed to *Bristol*, in order that the case might be at once tried.

JOLIFFE *v.* TWYFORD.

Nov. 5.

A testator commenced building a column on his estate, which was only half finished at his death. By his will, he declared that if the devisee for life of his estates "should neglect to keep in complete repair the column then being erected," he should forfeit his estate. *Held*, that this implied no obligation on the executors to complete the column out of the testator's assets.

THE testator, *John Twyford Joliffe*, having resolved to erect a column in *Ammerdown Park*, to the memory of his father, caused a model in wood to be prepared, under the superintendence of his architect. The erection of the column was commenced in *August*, 1852,

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1852, but the work was not executed by contract. The testator died in *March*, 1854, at which time the column had reached about one-half of its intended heighth, and the necessary materials for completing it had, for the most part, been prepared. With small exceptions, the testator's estate was under no liability in respect of contracts entered into by him for the completion of the column.

The testator, by his will, dated the 15th of *March*, 1854, devised his real estates on certain trusts, under which the Plaintiff was tenant for life, with divers remainders over, and he also bequeathed to the trustees for the time being of the parish school of *Kilmersdon* the annual sum of 20*l.*, to be paid by the person or persons who for the time being should be entitled to the estates, and to be applied by such trustees towards the maintenance, repair or rebuilding of such school, or for the benefit of the schoolmaster and scholars for the time being of such school.

He also gave his personal estate to the Plaintiff for life, with remainders over; and his will contained the following declaration:—"I declare, that if any person made tenant for life or tenant in tail, by purchase, of the estates by this my will devised or bequeathed, and being at the same time in possession," &c., "shall neglect to keep in complete repair the column now being erected at *Ammerdown Park*, aforesaid, to the memory of my late father, or to pay the said annual sum of twenty pounds to the trustees for the time being of the said parish school, the person so neglecting shall thereupon forfeit all the estates taken by him or her under this my will, and my will shall take effect as if such person had died at the time of the neglect taking place."

After

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After the testator's death in 1854, doubts had been suggested as to the fund from which the cost of completing the column mentioned in the will, and left unfinished at the said testator's death, should be defrayed.

Mr. *R. Palmer* and Mr. *Eddis*, for the Plaintiff, the first tenant for life, argued that the clause of forfeiture, in case of any neglect to keep the column in complete repair, rendered it necessary for the Plaintiff to keep in repair the complete column, and not a portion of it; that this involved, by necessary implication, an obligation on the executors, out of the testator's assets, to complete it, in order to give to the devisee of the estate the power of avoiding a forfeiture, by keeping the completed column in repair.

Mr. *Lloyd* and Mr. *Lewin*, for the second tenant for life, supported the Plaintiff.

Mr. *Selwyn* and Mr. *Murray*, for the trustee and executor, were not heard.

The MASTER *of the* ROLLS.

I entertain no doubt on the question relating to the column. The point arises on the construction of the will and you must, therefore, find in the words of the will a direction to complete, either by express words, or by necessary implication arising from the expressions used. The words are these: "I declare that if any person," &c. (*a*). It has been argued, that they involve, by necessary implication, a direction to complete as well as to keep in repair. If that be so, it would be a stronger

(*a*) *See ante, p.* 228.

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stronger instance of an implication than I have ever met with. What the tenant for life is to keep in repair is "the column now being erected." Now, in the case of a farm, where a tenant covenants to keep in repair, it means that he is to keep it in the state of repair in which he finds it, and it does not involve an obligation of first putting it in complete repair in the first instance. It would be a strong construction to say that to keep a building in repair implies an obligation to make it much larger. If it had been proved that there was no mode of keeping this column in repair except by making it 100 feet higher, a different question might arise. I cannot hold, that the clause of forfeiture, in case the devisees neglect to keep the column then erecting in complete repair, involves an obligation to keep in repair anything more than what the testator left at the time of his death.

It would be a violent construction to hold, that this clause of forfeiture imposed an obligation on the testator's estate to pay a considerable sum of money for completing that which, no doubt, he intended to complete if his life had been prolonged. On a similar principle I might hold, that the gift of the annual sum of 20*l.*, to be applied towards the maintenance and repairing the school, involved in the building of a school.

I cannot find that any obligation has been imposed on the testator's estate to complete the column, and I am of opinion, that his personal estate is not properly applicable to that purpose.

DECREE.

Declare that the testator's personal estate is not liable to the cost of completing the column beyond the amount which became payable after his death under such contracts as he may have entered into in his lifetime.

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DENNING *v.* ELLERTON.

Nov. 11, 12.

IN the events which happened, Mrs. *Glassen* had, under her marriage settlement, a power to appoint a trust fund as follows:—One equal fifth part in trust for *Francis Mouat Keith Robertson*, one other equal fifth for the children of *Margaret Rebecca Ellerton*, and the three remaining equal fifth parts, upon trust for all the children of Sir *George Mouat Keith* by his wife Lady *Catherine Mouat Keith, living at the time of the decease of Lady Catherine Mouat Keith.* And in case there should not be any such child of Lady *Catherine Mouat Keith* by Sir *George Mouat Keith*, who, under the trusts aforesaid, should obtain a vested interest in the trust moneys, then "in trust for the *next* of kin of the said *Catherine Mouat Keith* living at the time of her decease as aforesaid."

And it was by the settlement declared, that it should and might be lawful for Mrs. *Glassen*, by her will, "to revoke or make void all or any of the trusts lastly thereinbefore mentioned concerning the said several fifth parts or shares of the said trust moneys," &c., "and to appoint the same unto, between and amongst the persons who, under the trusts lastly thereinbefore declared, would have become entitled to the said trust moneys, stocks, funds and securities, in the proportions and manner aforesaid, or in such other parts, shares and proportions, *and in such manner and form*, in all respects, as she the said *Cecilia Mouat Keith* should think fit and see occasion."

Mrs. *Glassen*, by her will, appointed three-fifths of the fund equally amongst Mrs. *Catherine Jackson*, Miss *Mary Keith* and Miss *Isabella Keith* (daughters of Sir *George* and Lady *Keith*). The testatrix died in 1845.

Mrs.

By the settlement of *A. B.*, and in the events which happened, two-thirds of the fund was limited to certain persons, and three-fifths to the children of *C. D.* "living at the time of the decease of *C. D.*" and in default, to *C. D.'s* next of kin. Power was given to *A. B.* to revoke these trusts, and to appoint the trust fund among the persons who, under the trusts aforesaid, would have become entitled to the funds, "in the proportion and manner aforesaid, or in such manner and form, in all respects, as *A. B.* should think fit." *A. B.* appointed to a child of *C. D.*, who survived *A. B.*, but died in the life of *C. D. Held*, that such child was not an object of the power.

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DENNING v. ELLERTON.

Mrs. *Catherine Jackson* died in 1848, and Lady *Keith* in 1851.

Mr. *Jackson*, the husband of *Catherine Jackson*, now claimed to be entitled, in right of his late wife *Catherine Jackson* deceased, to one equal fifth part of the trust funds. On the other hand, it was alleged, on behalf of *Isabella Keith* and *Mary Keith*, that such claim was not sustainable, inasmuch as Mr. *Jackson's* late wife died in the lifetime of her mother Lady *Catherine Mouat Keith*, and consequently was not an object of the power of appointment reserved to the said testatrix by the settlement.

Mr. *Fischer* for the Plaintiff, the trustees.

Mr. *R. Palmer*, Mr. *Southgate* and Mr. *Faber* for the Defendants.

The MASTER *of the* ROLLS.

Nov. 12. I think that the meaning of this clause is very distinct. The power given to this lady to revoke or make void all the trusts and to reappoint the fund appears to me susceptible of no difficulty whatever. It is true that if it had happened that no child of Lady *Keith* survived her, the property was to go to her next of kin living at her death, but that does not affect the circumstance that the persons to take are pointed out. I think that Mrs. *Glassen* was empowered to divide three fifths amongst the persons who would have taken under the previous trusts; that she could alter the proportions, and the manner and form in which they were to take, but not alter the persons to take.

It is therefore perfectly clear, in that view of the case, that Mrs. *Jackson* was not entitled to take under the appointment.

1858.

NOBLE *v.* BRETT. (No. 2.)

Nov. 24.

An executor administered an estate, and paid over the residue. Ten years after, a creditor of the testator brought an action of covenant against the executor, who filed a claim for administering the estate and a bill to make legacies standing in the joint names of the executor and legatee applicable to the payment of the debt. The debt was paid out of the legacy, but *held*, that the executor was entitled to no costs of the action or suits.

THE testator died in 1846. In the same year, in pursuance of directions contained in his will, his executors, *Noble*, *Sarah Brett* and *Davies*, invested a sum of 2,000*l.* in the joint names of themselves and *Samuel Hodges* (an infant) to answer a legacy given him by the will, and which was payable when he attained twenty-five. *Sarah Brett*, the residuary legatee, in the same year (1846) received the residue, amounting to about 308*l.*

Ten years after, a claim arose against the testator's assets, under a covenant in a lease, and an action at law was brought by *Dyson* against the executors in respect of it. Having no defence at law, *Noble*, in *July*, 1856, filed a claim against Mrs. *Brett* for the administration of the estate, and as this would not have reached the legacy set apart, he filed a bill in *December*, 1856, against Mrs. *Brett* and *Samuel Hodges*, which he called supplemental, to make the legacy available for payment of *Dyson's* demand. *Dyson* came in under the decree, and established a debt for 207*l.*, and the attempts to get it paid out of the residue having failed by the insolvency of Mrs. *Brett*, he established his right as against the legacy (*a*), and payment was ordered out of it when transferred into Court.

A difficulty arose in getting the legacy transferred; and Mr. *Dyson*, having neglected to prosecute the order, Mr.

(*a*) 24 *Beav.* 499.

1858.

NOBLE v. BRETT. (No. 2.)

Mr. *Harley* (to whom *Samuel Hodges* had assigned his legacy) presented a petition to get a transfer into Court, under the Trustee Act, for payment to *Dyson* of his demand and of the residue to himself. The questions were as to the costs of the different proceedings.

Mr. *Hardy*, in support of the petition, argued, that the Plaintiff was entitled to no costs out of the legacy set apart and appropriated, the whole of the litigation having arisen from his own negligence in distributing the residue, out of which, and not out of the legacy, the claim of the creditor ought properly to have been paid.

Mr. *R. Palmer* and Mr. *G. L. Russell* for *Noble*, argued, that the executor ought to have the costs of the action and of the suit, which was for the administration of the estate, and that he must be looked on in the light of a trustee for the owner of the fund, and as such ought to be indemnified from all costs.

The MASTER *of the* ROLLS.

The executors have fully administered the estate and allowed the residuary legatee to retain the residue. After a considerable number of years had elapsed, *Dyson* raised a claim against the testator's estate for a debt under a covenant in a lease, and he brought an action against the executor to recover damages for a breach of covenant. The first question is as to the costs of this action. I am of opinion that the executor ought not to have resisted it; he had no defence to it, and the result has proved it. He cannot therefore properly throw his costs of the action on the legacies in this particular case.

Having

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NOBLE v. BRETT. (No. 2.)

Having done this, he files a claim, which he calls one for the administration of the estate, but practically it is no such thing; it is a suit instituted for the purpose of making certain sums of money, set apart to answer certain legacies, answerable for payment of the debt due to *Dyson*. I was of opinion that the executor was right to this extent, that the debt was payable out of the money set apart for the legacies, though, as I stated, the question was one of considerable nicety as between the executor and legatee. I thought that the money not having been paid over to the legatee, it must be treated as liable to pay the debt, but I think that it cannot be treated as a fund in the hands of the executor, or a fund under administration, in which cases the executor would be entitled to all his costs. The debt ought to have been paid by the residuary legatee, but the amount which had been paid to her as residue could not be obtained back from her. If the executor had paid the debt out of his own money, which at law he was liable and bound to pay, and if he had then gone to the legatee and his assignee and shewn that the legacy was liable to recoup him, and they had resisted his claim, I should then have thought that the Plaintiff would have been entitled to his costs as against them; but this suit is directed by the Plaintiff against a particular fund in order to get rid of his liability. I cannot treat this as a suit for the administration of the estate; it is one instituted by the executor to obtain payment of this debt out of the appropriated legacy, nor can I treat Mr. *Noble* as a trustee for the Petitioner.

The Plaintiff, therefore, cannot have his costs of the action or of the suit, but he must have the costs of this petition, for it was necessary for the Petitioner to apply, and the executor, who was necessarily served with the petition, was justified in appearing upon it.

1858.

WEBSTER *v.* PARR.

Nov. 15.

A testator directed that, as his sons attained twenty-five, his executors should pay them a share of his estate and effects, it being his will that his sons and daughters should receive equal shares of his estate. And as his daughters attained twenty-five, the executors were to invest 1,000*l.* each for them for life, and the difference between this and their share paid to them. In case any daughter "should die without issue," the 1,000*l.* was to be divided "amongst such of his children as might be then living, and the issue of such as might be dead, share and share alike," the issue to take the like share as the parent would, if living, have been entitled to. *Held*, that the gift over was on an indefinite failure of issue; that there was an absolute gift of the 1,000*l.* in the first instance to the daughters, which had not effectually been cut down, and that the daughters were absolutely entitled to the 1,000*l.*

THE testator died in 1829. By his will, dated in 1827, he directed his executors to allow, out of his estate, what they should consider adequate for the education, maintenance and bringing up of his sons and daughters, namely, *Mary Hadfield*, *William Hadfield*, *Hannah Hadfield*, *Thomas Hadfield*, *Jane Hadfield*, *John Hadfield* and *Samuel Hadfield*; and when and as his sons respectively arrived at the age of twenty-five years, he directed his executors to pay to each of them such a sum of money as they might consider a child's portion or share of his estate and effects, it being his will that his said sons and daughters should receive and be paid equal portions and shares of his estate and effects. "And when and as my said daughters arrive at such age of twenty-five years, but not sooner, I order and direct my said trustees and executors, &c., to place out at interest the sum of 1,000*l.* each, to be paid to them yearly, during their natural lives, and their receipts alone for such interest shall, notwithstanding their coverture, be a sufficient discharge to my said trustees and executors. And I order and direct that the difference between the 1,000*l.* each and the share to which they may respectively be entitled to under this my will may be paid to them, respectively, when and as they attain the said age of twenty-five years." He subsequently

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quently proceeded as follows :—" And it is my will and mind, that in case all or any of my said daughters shall die without issue, then and in such case the 1,000*l.* each, so ordered to be placed out at interest as aforesaid, shall, on such of their deaths without issue as aforesaid, be divided amongst such of my children as may be then living and the issue of such as may be dead, share and share alike, the issue of a deceased parent or parents to take equally amongst them the like share or interest only as the parent or respective parents would, if living, have been entitled to."

The three daughters attained twenty-five. The question was, whether the gift over of the three legacies of 1,000*l.* each was valid?

Mr. *R. Palmer* and Mr. *Giffard* for the Plaintiff. The gift over is void, being after an indefinite failure of issue, and the daughters each take absolute interests in 1,000*l.*; *Campbell* v. *Harding* (*a*). Secondly. No gift to the issue can be implied, from the circumstance of there being a gift over in default of issue; *Lee* v. *Busk* (*b*).

Mr. *Field, contrà.* The gift over to the children then living is not too remote; *Ranelagh* v. *Ranelagh* (*c*); it is not on an indefinite failure of issue, but must take effect on the death of the daughters. Secondly. The children of the daughters take by implication; *Ex parte Rogers* (*d*).

The MASTER *of the* ROLLS.

In a case in which I was engaged, Lord *Cottenham* declined to follow *Ex parte Rogers.*

I do

(*a*) 2 *Russ. & Myl.* 390; 2 *Cl. & Fin.* 421.
(*b*) 14 *Beav.* 459; 2 *De Gex, M. & G.* 810.
(*c*) 2 *Myl. & K.* 441; 4 *Beav.* 419.
(*d*) 2 *Madd.* 449.

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I do not entertain much doubt on this will. I am of opinion that the gift over is on an indefinite failure of issue. The Court, whether in the case of realty or personalty, has held that "dying without issue" means, *primâ facie*, an indefinite failure of issue. It may be cut down with respect to personalty by the circumstance that the failure of issue is to be ascertained at the death of tenant for life, and that may be shewn by various circumstances, one of which is, where the gift over is to a person mentioned in the will to be in *esse*; the Court then supposes that the failure of issue is to be at the death of tenant for life. I look then to see if this legacy is given over to the children of the testator, but I find it is given not to them solely, but to them "and the issue of such as may be dead." The case is, therefore, taken out of the authority of *Ranelagh* v. *Ranelagh* and brought within *Campbell* v. *Harding*.

I concur, however, in this:—that there is, in this will, an absolute gift to the daughters, in the first instance, of the whole share of the estate, which is given to the children in equal portions. Being so given, I must see that it is by the will taken away from them, before I can deprive them of it. Having given equal shares to each daughter, the testator directs 1,000*l.* to be taken out of their shares for the purposes mentioned in the will, which are perfectly good, and which give each daughter an interest for her separate use for life in 1,000*l.* part of her share: subject to this, the whole is given to them absolutely, and the difference between the 1,000*l.* and the share of each is to be paid to each daughter at twenty-five. If the will had stopped there, no question would have arisen, each daughter would have taken an absolute interest in her share; then comes the gift over on an indefinite failure of issue, which is bad, and must be disregarded. The result is, that the original gift remains unaffected,

unaffected, and the daughters take absolute interests in these sums of 1,000*l*.

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See 1 *Vict. c.* 26, *s.* 29.

In re THE TIVERTON MARKET ACT. (No. 2.)

Dec. 11.

In a transferred *Exchequer* case, the Court was only authorized by the act to order the costs of re-investment of the purchase-money of lands compulsorily taken by a corporation. Parties having become absolutely entitled, applied for payment to them out of Court of the money, instead of re-investing it:—*Held*, that the corporation must pay the costs.

UNDER this act (*a*), the Corporation of *Tiverton* was empowered to take compulsorily certain property for the purposes of the act. As to the costs, the 20th section provided as follows:—

That where, by reason of any disability or incapacity of the person or persons or corporation entitled to any messuages, &c. to be purchased under the authority of the act, the purchase-money for the same should be required to be paid into the Court, and to be applied in the purchase of other messuages, &c., to be settled to the like uses, in pursuance thereof, it should be lawful for the Court to order the expenses of all purchases from time to time to be made in pursuance of the said act, or so much of such expenses as the Court should deem reasonable, together with the necessary costs and charges of obtaining such order, to be paid by the corporation out of the money arising by virtue of the act, and that they should, from time to time, respectively pay such sum or sums of money for such purposes as the Court should direct.

Under this act, certain property was taken, which had been devised to *Henry Marden* for life, with divers remainders over. The purchase-money was paid into the Court of Exchequer, and by an order made in 1840, it

(*a*) 6 *Geo.* 4, *c. cxxxix.*

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In re THE TIVERTON MARKET ACT. (No. 2.)

it was directed to be invested, and the dividends paid to the tenant for life.

The tenant for life died, and the jurisdiction having been transferred to this Court by the 5 *Vict.* c. 5, a petition was presented by persons who, having barred their entail (*a*), had become absolutely entitled to the property, praying payment to them out of Court of the fund, and that the corporation might pay the costs. The only question was, whether the corporation ought to pay the costs of this application.

Mr. *Karslake*, in support of the petition.

Mr. *Berkeley*, for the corporation, objected that the act did not authorize the Court to order them to pay the costs in this case.

He referred to the judgment of Lord Justice *Turner* in *Re Ellison's Estate* (*b*).

The MASTER *of the* ROLLS.

I think I have decided this question on a former occasion (*c*); and I have considered these costs come within the scope of the act. I cannot see how the costs of investing the money in land differs from coming and taking the money itself.

The corporation must pay the costs.

(*a*) *See* 20 *Beav.* 374.
(*b*) 25 *L. J., Ch.* 379.
(*c*) *See In re Robertson*, 23 *Beav.* 433; *In re Land's Trust*, 4 *Kay & J.* 81.

1858.

CUTFIELD *v.* RICHARDS.

Dec. 17.

A mortgagee of a 1,000 years' term filed a bill for foreclosure. At the hearing, by arrangement, a decree was made for the sale of the fee. It produced a little more than sufficient to pay the mortgage. The Defendants declining an inquiry as to the value of the reversion in fee, *Held*, that the Plaintiff's costs had priority over those of the Defendant.

Plaintiff was mortgagee of some freeholds for a term of 1,000 years. She instituted this suit t parties entitled to the equity of redemption the mortgagor who was dead, praying an account at was due to her, and, in default of payment, a sure of the "residue of the said term of 1,000 " or for a sale of the premises.

he hearing, it was ordered, by arrangement, that e simple of the premises comprised in the mort- ecurity should be sold, and accounts and inquiries irected.

fee simple produced 841*l.*; there was found due Plaintiff 740*l.* odd, leaving a balance of about

cause came on for further consideration.

Follett and Mr. *Kingdon*, for the Plaintiff. Plaintiff is entitled to her principal, interest and n the first instance; the Defendant's costs must out of the residue, if any; *Ford* v. *Lord Ches-d* (*a*).

Selwyn, for *Lewis Richards*, the heir at law. s in the nature of an administration suit, for the t of all parties interested in the estate. It differs a common mortgage suit, and comes within the tated by the Court in *Armstrong* v. *Storer* (*b*), where

(*a*) 21 *Beav.* 126 (*b*) 14 *Beav.* 538.

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where the Court says—" But if the mortgagee, instead of insisting on his right to foreclose, choose to institute a suit for the administration and sale of the testator's estate, he introduces a new element not within his contract, and as he does not rest exclusively on his contract, but seeks something beyond it, the costs of the suit are, in that case, considered as costs of administration, and are to be paid in the first instance if the estate prove deficient. He seeks, in fact, in such a case, something beyond the foreclosure; something which his contract would not have given him."

So in *Macrae* v. *Ellerton* (*a*), *S. W.* was a mortgagee of freehold and leasehold premises. The mortgagor died in 1837, and the mortgagees filed a bill against the legatee, devisee and executors, seeking a foreclosure or a sale of the property. The freeholds and leaseholds were sold under the decree, but the proceeds were insufficient to pay the Plaintiff's debt. At the hearing on further consideration, the Court held, that the four Defendants were entitled to be paid their costs (one set as between solicitor and client) out of the fund realized by the sale of the property. Sir *John Stuart* observed (*b*), that " there had been a realization which the Plaintiff could not effect under the power of sale in the deed."

No inquiry has been directed as to the relative value of the term and the reversion in fee.—[*The* MASTER *of the* ROLLS: The reversion alone would sell for nothing, but the fee would produce more than the term.]

Mr. *Lloyd* and Mr. *Simpson*, for two other Defendants, argued that the Plaintiff had obtained something beyond his strict legal rights, that if there had been a deficiency,

(*a*) 4 *Jurist*, 967. (*b*) *Page* 969.

a deficiency, the case of *Macrae* v. *Ellerton* would have strictly applied, and that the principle was the same although there was a small surplus.

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The MASTER *of the* ROLLS.

This is a simple mortgage suit for realizing the security, and the persons necessary for that purpose are alone parties to it. It prays a foreclosure or sale of the mortgage securities, which is a 1,000 years' term, and, unless by consent, the Plaintiff could not have obtained any further relief at hearing. But, at the hearing, the persons interested in the equity of redemption and the fee agreed that the whole should be sold, and, instead of taking a decree for foreclosure or sale of the property comprised in the term, a decree was taken for a sale of the whole fee simple.

If the property comprised in the 1,000 years' term would have produced sufficient to pay the Plaintiff, the sale of the fee could only have been for the benefit of those who were entitled to the reversion. They have taken their chance of the estate producing more, and cannot be in a better situation.

It is impossible to turn this into an administration suit. There appears to have been a good deal of administration in the suit before Vice-Chancellor *Stuart*, but this is nothing but a simple bill to enforce a mortgage security, and the decree itself shews it. I think that the mortgagee must be paid his principal, interest and costs in the first instance.

Is any inquiry asked as to the amount of the purchase-money which is attributable to the reversion in fee?

Mr. *Selwyn* declined any inquiry.

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BURGESS *v.* HILLS.

Dec. 17.

The Defendant innocently used the Plaintiffs' trade-marks, and, on being served with the bill, he removed the labels, and gave an undertaking not to sell any more, but refused to pay the costs. The suit was continued to a hearing, and the account of profits, which were very trifling, was waived:— *Held*, that the Defendant must pay the whole costs of suit.

THE Plaintiffs carried on the business of Italian Warehousemen in *London*, and one of the articles which they and their predecessors in the business sold was a sauce which they called "Essence of Anchovies."

The Defendant had sold a similar sauce, under the description of "*John Burgiss* & Son's Original and Superior Essence of Anchovies." The labels attached to the bottles, in which the sauce was sold, were mere colorable imitations of the labels long used by the Plaintiffs and their predecessors.

The Plaintiffs filed the bill for an account of the profits derived by the Defendant from the sale of the sauce, and for an injunction, to restrain the Defendant from selling the sauce in bottles bearing the Plaintiffs' labels, or colorable imitations of them thereon.

It appeared, upon the answer and evidence, that the Defendant, a grocer in *Birmingham*, had purchased his business in 1854, when he found thirty-five bottles in stock, and he had since purchased more, from a Mr. *Ward*, a wholesale dealer. But down to the time when he was served with the bill (2 *July*, 1858) the Defendant was ignorant of the Plaintiffs' rights, or that the labels on the bottles were a piracy. Being served, he explained the circumstance, removed the objectionable labels from the bottles, and gave the solicitor's clerk an undertaking not to sell any more.

On

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On the 9th of *July*, he was served with an injunction, when he applied to the Plaintiffs' solicitor to stop the proceedings, who offered to do so on payment of the costs, which he stated to be 50*l*. This sum the Defendant considered unjust, and his solicitor, on the 10th of *July*, proposed that the injunction should be continued, each party bearing his own costs, and he continued as follows:—"but if you press the suit on for hearing, and incur further costs to the Defendant, I shall then ask the Court that your clients be made to pay them."

On the next day, the Plaintiffs' solicitor, in reply, proposed that "the injunction should stay, the Defendant pay the Plaintiffs' costs up to the present time, which he agreed to pay." This was declined on the 13th of *July*, 1858.

On the 27th *September*, the Plaintiffs offered to discontinue on payment of taxed costs, which the Defendant declined, but he offered "to let the proceedings stand as they were," if the Plaintiffs would pay the Defendant's costs.

Not being able to arrange any terms, the Plaintiffs, on the 15th *November*, gave notice of motion for a decree, which they now brought on.

The profit derived by the Defendant from the sale of the anchovies did not exceed 2*l*.

Mr. *R. Palmer* and Mr. *Regnier W. Moore* for the Plaintiffs, merely asked that the injunction might be made perpetual, and that the Defendant might pay the costs. They relied on *Burgess* v. *Hately* (*a*).

Mr.

(*a*) *Post*, *p.* 249.

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Mr. *Cotterell* for the Defendant.

The Defendant has acted innocently and in total ignorance of the Plaintiffs' rights, or of the piracy of the labels. The Plaintiffs ought to have appealed to the Defendant previous to instituting the suit, and he would, at once, have submitted, and the litigation would have been, by these means, altogether avoided. The Plaintiffs ought either to pay the Defendant's costs, or at least all those incurred subsequent to the Defendant's submission to the Plaintiffs' claim, or, at all events, the Court, following *Millington* v. *Fox* (*a*), should allow the Plaintiffs no costs of the suit. In *Millington* v. *Fox* (*a*), an application had been made to the Defendants before suit, which, as the Court held, "was met by the Defendants" in a manner which justified the Plaintiffs in filing the bill; but the Defendants had immediately afterwards submitted to the Plaintiffs' demands. The Court thought the conduct of the Plaintiffs unjustifiable in prosecuting the suit to a hearing, and gave them no costs.

Secondly, as the only question remaining after the submission was the costs of suit, the Plaintiffs might have had the point decided on a simple motion. In *Sivell* v. *Abraham* (*b*), Lord *Langdale* held, that when the demand of the Plaintiff is submitted to, and the only question between the parties is as to the costs of the suit, the cause ought not to be proceeded in, but an application ought to be made to the Court to prevent the expense of further proceedings. He also cited *Chappell* v. *Davidson* (*c*).

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This is one of those painful cases in which, in consequence

(*a*) 3 *Myl. & Cr.* 338. (*b*) 8 *Beav.* 598. (*c*) 2 *Kay & J.* 129.

sequence of mistaken views, parties proceed in a course of useless litigation, when their rights were ascertained, and the question between them might have been settled by the application of the simplest common sense.

The case is this: the Plaintiffs have a right to a particular label, that right is interfered with by the Defendant, but it being impossible for the Plaintiffs to tell to what extent his right is interfered with, he applies to the Court to restrain the interference. I fully believe that the Defendant did not know that he was doing wrong, and that he believed that he had a right to sell this article. But it is a very old and very necessary legal maxim, that *ignorantia legis neminem excusat.* It is impossible to allow a person to escape from his liability, when he has interfered with the rights of another, on the plea that he acted in ignorance of that person's rights. It is the duty of this Court to instruct parties that they must not interfere with the rights of other persons:—that the person whose rights are interfered with is the person aggrieved, and that the person who interferes with them is the aggressor. I concur in the opinion of Sir *James Wigram*, that it would be a useful rule to require that in most cases the Plaintiff, before he files a bill, should apply to the Defendant to know whether he will or will not accede to his demands, but, as the Vice-Chancellor says, that is not the law of the Court, and that rule has never been acted upon. In many injunction cases it would be impossible to act on it, because the injury would be done while the application to the Defendant was being made.

That being the case, I am clearly of opinion, that the Plaintiffs had a right to come to this Court for an injunction to restrain the use of their trade mark. The Defendant appears to me to have acted extremely proper,

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proper, in saying at once, that he did not wish to interfere with the Plaintiffs' trade mark, that he did not know he was doing anything wrong, that he would give an undertaking to sell no more; besides this, he took the objectionable labels off the bottles, so that no more might be sold. Nothing more would have been to be done, if he had said, as was said in *Millington* v. *Fox*, "I will make you compensation for any injury and pay your costs," or if the Defendant here had said simply, I will pay you the costs of the suit, for, under the circumstances of this case, I should have considered the offer of the taxed costs without damages sufficient, and all that could have been required of him. If he had said, "I will pay you the reasonable costs of suit, but they must be taxed by the proper officer," I should have viewed the matter in a very different light.

It is said, that after the Defendant's submission, the Plaintiffs should have applied to the Court to compel him to pay the costs; but it is clear, that the Plaintiffs had no means of doing so. If they had given notice of motion, and the Defendant had resisted it, the simple result would have been, that the Court would have refused the motion with costs.

They had, therefore, no means of getting the costs, except by proceeding to a hearing. All the cases cited shew, that up to the time when notice was given, the Plaintiffs were entitled to their costs, which being refused by the Defendant, it became necessary for the Plaintiffs to incur the further expense of bringing the cause to a hearing to obtain them. In *Millington* v. *Fox*, where the offer by the Defendant had been to do everything, which of course would have included paying the costs up to the time when he received notice, Lord *Cottenham* held, that the Plaintiff should not have his

costs

costs, on the ground that he went on with the suit to obtain something which he afterwards abandoned.

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This idle litigation is much to be regretted, some mistake of the rights of the parties, and possibly some little temper, has made it necessary to bring the cause to the hearing.

I have no power to do anything but adjudicate on the rights of the parties, but if the Defendant had offered the Plaintiffs all they were entitled to, and after that the Plaintiffs had proceeded in the suit, I most certainly should not have given the Plaintiffs a penny of the costs incurred after that period, indeed I should have endeavoured to make them pay them. The Defendant ought to have offered the Plaintiffs the costs they had incurred, but instead of doing so, he has refused to pay them.

The Plaintiffs are entitled to a perpetual injunction, with their costs of suit.

BURGESS *v.* HATELY.

Dec. 14.

A suit was instituted to restrain the user of a trade-mark, and for an account. No application was made to the Defendant before suit, and the Defendant said he would have desisted if applied to. At the hearing, the account was abandoned, but a perpetual injunction was granted:—*Held*, that the Defendant must pay the costs.

THIS was a suit to restrain the Defendant from selling a sauce called "Essence of Anchovies," in bottles having labels similar to those of the Plaintiffs, and for an account.

The Plaintiffs, who had obtained an injunction, now moved for a decree. The Court held, that the imitation was

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was proved, and the only remaining question was as to the costs of the suit.

No application had been made to the Defendant before suit, and the Defendant stated, that he was ignorant of the Plaintiffs' rights, and that if the Plaintiffs had required him, by letter or notice, to discontinue the use of the label, he would have readily complied therewith, without any proceeding at law or in equity, as such label never had been of the smallest value or benefit to him. He said, that on discovering, after the bill was filed, that the Plaintiffs claimed the label as their own property, and as descriptive of the sauces of their own manufacture, he had not since used any of the labels, and he continued to abstain from their use in future; however, he still submitted, that the Plaintiffs, before obtaining the relief sought by their bill as to the labels, were bound to establish their original and exclusive right thereto.

Mr. *R. Palmer* and Mr. *R. Moore* for the Plaintiffs, waived the account, and asked for a perpetual injunction with costs.

Mr. *Haddan*, for the Defendant, only argued the question of costs.

The MASTER *of the* ROLLS.

This suit has been brought to a hearing for the mere purpose of determining the question of costs, and, in my opinion, it is one in which the costs must follow the event, and be paid by the Defendant.

The case is this:—The Defendant has been using, what, in my opinion, is a colorable imitation of the Plaintiffs'

Plaintiffs' trade-mark, and, thereupon, the Plaintiffs, without making any application to the Defendant, file a bill for an injunction. I think they were justified in doing so. The aggression was on the part of the Defendant, by the user of the Plaintiffs' trade-mark, and which the Plaintiffs were entitled to prevent. If the Defendant did not dispute the Plaintiffs' right, the proper course for him to have taken was this:—He should, at the first moment, have said to the Plaintiffs, that he did not dispute their right, and that he was ready to pay their reasonable costs. Instead of adopting that course, the Defendant insisted, that the Plaintiffs had no right to file the bill, and although he was willing to submit to an injunction, he put in an answer saying, the labels were of no use to him, and that he had abandoned the use of them. A more idle litigation on his part can scarcely be conceived. The suit is then continued and brought to the hearing, for the mere purpose of determining whether the Defendant ought to pay the Plaintiffs' costs. After it has been determined, that the Defendant is not at liberty to use that colorable imitation of the Plaintiffs' labels, and that the Plaintiffs are entitled as of right to an injunction to restrain him, it is impossible for the Court to avoid giving the Plaintiffs the general costs of the suit as against the Defendant who has failed, and who insists that he is not liable to pay that which generally follows the decision of a right, namely, the costs of obtaining that decision. The Defendant at the hearing argues particular points of evidence, and asks for the costs relating to them; but I cannot accede to the Defendant's view. A mass of costs has been caused by the Defendant not giving way in a matter in which, in my opinion, he had no right to resist, and the consequence is, that the injunction must be made perpetual, and the Defendant must pay the costs of the suit.

1858.

GASKELL *v.* CHAMBERS. (No. 1.)

Dec. 8.

A company, though not formally dissolved, had practically ceased to exist, and had no office or officers. The company being made Defendants in a suit, the Court ordered that service of the bill on the late chairman and the secretary should be good service on the company.

THE *London* Mutual Life and Guarantee Society had, in 1857, sold its business to another office, and though never formally dissolved, it had practically ceased to exist. It had no business or place of business, and the directors and other officers had altogether ceased to act. The chairman was dead.

A suit having been instituted, to which the company was make a Defendant, a difficulty arose as to serving the company with the bill.

Mr. *R. Palmer* and Mr. *Beavan* moved for an order for substituted service.

The MASTER *of the* ROLLS.

Let service on the late deputy chairman and on the late secretary be good service on the company, and let the order now made be served with the bill.

1858.

BARNARD *v.* CAVE.

Dec. 10, 11.

The Plaintiff agreed to take a lease of a public-house from the Defendant (a brewer), but the written contract said nothing as to the restrictive covenants of a brewer's lease. The Plaintiff instituted a suit to obtain an unrestricted lease. The restricted parol agreement being established by extrinsic evidence, *Held*, that the bill must be dismissed. The Plaintiff having then elected to take a brewer's lease, a decree was made, the Plaintiff paying the costs of the suit.

THE Plaintiff (a publican) agreed to take a lease of a public-house belonging to the Defendant (a brewer), and on the 8th of *June*, 1838, they signed the following memorandum of agreement:—

June 8th, 1857.—Memorandum of agreement for a lease of fourteen years of a house intended for a tavern, situated at *Aldershott*, and called *The Malakoff*, between *William Cave* on the one part, and *James Barnard* on the other part. The said *James Barnard* agrees to take and the said *William Cave* to let the above-named house for the term specified, and at the yearly rent of 120*l.* per annum. As witness our hands.

William Cave.
James Barnard.

The draft of a lease was prepared in the form of a "brewer's lease," obliging the tenant to purchase the beer consumed in his house from the lessor, the brewer. The Plaintiff refused to concur in that restriction, and insisted on having a lease as of a "free public-house," and he filed a claim for the specific performance of this written agreement.

The Defendant objected, that the real agreement come to between the parties, though not so expressed in the written instrument, was, that the lease should be a "brewer's lease." Considerable parol evidence was entered into, which it is unnecessary to state, the Court having come to the conclusion, on the conflict of the evidence, that the parties had really agreed for a brewer's lease, though it was not so expressed in the written agreement.

Mr. *Palmer* and Mr. *Cory*, for the Plaintiff.

Mr.

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Mr. *Follett* and Mr. *Wickens*, for the Defendant. *Townsend* v. *Stangroom* (*a*); *Watson* v. *Marston* (*b*), were cited.

The MASTER *of the* ROLLS.

Dec. 11. On reading over the evidence in this case, I think it clear that the Defendant never intended to allow the Plaintiff to have what is called a "free public-house," but that it was intended that he should be restricted as to the sale of the beer consumed in it, and that it should be bought from the Defendant. The written agreement, which specified only the amount of the rent and the term of years to be granted, left every thing else open. The agreement as to the beer is a parol agreement, and is not binding, the term being for fourteen years, and it could not be specifically enforced in this Court, but it is available as a defence. Nothing is more common than a parol agreement for a lease to be carried subsequently into effect by a lease in writing specifying more fully the terms.

In other cases besides the present, the Court has been made aware, that when a brewer lets his public-house, he usually stipulates for the sale of the beer to be consumed in it. The Plaintiff was aware of this, and the evidence satisfies me that it formed part of the parol agreement between himself and the Defendant. I am of opinion, therefore, that the Plaintiff is not entitled to a decree for specific performance in the terms he asks for it.

[Mr. *R. Palmer:* The Plaintiff elects to take an ordinary brewer's lease.]

Then make a decree for settling the lease on that principle, and order the Plaintiff to pay the costs of suit.

(*a*) 6 *Ves.* 328. (*b*) 4 *De G., M. & G.* 230.

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BOURDILLON *v.* BADDELEY.

Nov. 5.

On a motion for a decree, the Plaintiff's affidavit in reply was filed on the 4th of *August*. The Defendant took no steps to cross-examine until after the Long Vacation, and he then asked, that the cause might stand over, to enable him to cross-examine the Plaintiff. *Held*, that he was not entitled as of right, and that it was matter of discretion, and the Court having heard the cause, and seeing no necessity for a cross-examination, made a decree.

THE Plaintiff filed his affidavits on the 10th of *May*, and on the 17th of *May* gave notice of motion for a decree. The Defendant filed his affidavits on the 28th of *June*, and the Plaintiff's time for filing affidavits in reply (*a*) having been extended, he filed a short affidavit in reply on the 14th *August*. The Defendant gave no notice of his intention to cross-examine the Plaintiff until *November*.

The motion for a decree was now brought on.

Mr. *R. Palmer* and Mr. *Jessel* for the Plaintiff.

Mr. *Rodwell*, for the Defendant, asked that the cause might stand over, to give the Defendant an opportunity of cross-examining the Plaintiff on his affidavit. He argued, that a party had a right to cross-examine in every case; 15 & 16 *Vict.* c. 86, s. 40; and upon a motion for a decree; *Williams* v. *Williams* (*b*). Secondly, that the month given by the 33rd Order of *August*, 1852 (*c*), and the 5th Order of 13th *January*, 1855 (*d*), did not run in the Long Vacation; 1st General Order of *June*, 1854 (*e*).

The Master *of the* Rolls said that it was a matter of discretion, and that the Defendant was not entitled, as of right, either under the statute or under the orders cited.

(*a*) *The 25th Order of 7th August*, 1852.
(*b*) 17 *Beav.* 156.
(*c*) *Ordines Can.* 470.
(*d*) *Morgan*, 341.
(*e*) *Morgan*, 336.

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cited. He heard the cause, and thinking there was no necessity for a cross-examination, he made the common decree for foreclosure.

NOTE.—*See The Marchioness of Londonderry* v. *Bramwell*, 3 *Kay & J.* 165.

JONES *v.* THE CONSOLIDATED INVESTMENT ASSURANCE COMPANY.

Nov. 11.

One of the conditions of a life policy was, that it should be void if the assured died by his own hand, except it should have been assigned to other parties, for valuable consideration, six months before his death. *Held*, that a letter to *A. B.* charging it with a floating balance due to him, and made three years previous to the death of the assured by his own hand, was within the exception.

IN 1850, *Edward Woolcott* effected an assurance on his life with *The Consolidated Investment Assurance Company* for the sum of 600*l.*

One of the conditions endorsed on the said policy was as follows:—"The policy of a person assuring his own life will become void if he dies by his own hand or by the hand of justice," &c., &c. "But should such policies have been assigned to other parties, for a valuable consideration, six calendar months before the death of the assured, they remain in force, to the extent of the beneficial interest therein of the parties to whom they shall have been so assigned."

Edward Woolcott was in the habit of obtaining advances of money from the Plaintiff on bills of exchange and promissory notes; there was a current account between them, and the Plaintiff held the policy as a security for the amount due to him, from time to time, on such account current.

In *June*, 1854, *Edward Woolcott* signed and gave to the Plaintiff the following letter:—"I hereby authorize and

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and empower you to hold the policy of insurance you hold upon my life for 600*l.* as security, in case of death or otherwise, for any notes of hand or bills of exchange you may have cashed for me."

The same course of dealing afterwards went on between the parties down to the death of *Edward Woolcott*, and the Plaintiff continued to hold the policy as a security.

On the 10th of *November*, 1857, *Edward Woolcott* shot himself.

He was indebted to the Plaintiff at the time in a sum exceeding 600*l.* His debt consisted of the returned cheques and the dishonoured bills and promissory notes of *Sanders* and *Woolcott*, amounting (after deducting the amount received) to 1,080*l.* 10*s.* All the items constituting this balance were subsequent to 1856.

The Plaintiff claimed the amount of the policy, but the company objected to his claim, and their solicitor stated, that the objections would probably be the following:—"1. That there was no assignment of the policy. Should this be waived, as to which however we now offer no opinion,—2. Then the letter only covers the personal accommodation to Mr. *Edward Woolcott*, and has nothing to do with *Sanders* and *Woolcott's* unpaid cheques or dishonoured acceptances."

The company's solicitor afterwards stated the objections in the following terms: "Looking at the terms of the letter of 29th of *June*, 1854, first, it is open to doubt if it intended to relate to any bills beyond such as had been then cashed for Mr. *Woolcott*. 'You may have

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cashed for me' are the words. 2. In the next place, as we have already stated, it is not an assignment under the condition indorsed on the policy. 3. Nor, if treated as an assignment, does it appear to come within the condition, as it was not 'for valuable consideration.' 4. Nor can it be contended, as we think, that advances to '*Sanders* and *Woolcott*' are advances to *Edward Woolcott*."

The Plaintiff instituted this suit against the company, praying a declaration of his right, and a decree for payment of the full amount of the policy out of the "stocks, funds and securities of the company."

Mr. *Lloyd* and Mr. *Bagshawe*, jun., for the Plaintiff, argued that the several objections above stated were untenable, and that it had been decided, in this Court, that an equitable assignment of the policy was within such an exception as the present; *Dufaur* v. *The Professional Life Assurance Company* (*a*).

Mr. *R. Palmer* and Mr. *Schomberg*, for the company, in opposition to the Plaintiff's claim, relied on the several objections raised by the solicitor of the company.

The MASTER *of the* ROLLS.

I think the Plaintiff is entitled to a decree in this case. On the first point, I think there was an assignment to the Plaintiff "six months before the death of the assured," within the terms of the special condition. Here is a letter written on the 29th of *June*, 1854, and the question is, whether that is an assignment or not? I entertain

(*a*) 25 *Beav.* 599.

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I entertain no doubt that this letter constitutes an assignment in equity, where alone, as it is a *chose in action*, it could be assigned. That being so, it is clear, that in the terms of the condition endorsed on the policy, it "has been assigned to other parties," and that this assignment was made, not six months, but four years, "before the death of the assured."

I dissent from the doctrine, that, according to the terms of this letter, the assignment must be considered as constantly recurring, and that a fresh assignment would be required as each liability was incurred. It was given to a person with whom the assured intended to have dealings, as a security for the balance on the transactions.

As to the consideration, I think that the moment a sum became due from *Edward Woolcott* to the Plaintiff, it constituted a good and valuable consideration for the purpose of supporting the assignment so made. It is true that if nothing had been due on it at the time, or if the balance had been on the other side, there would be no beneficial interest in the Plaintiff or anything which this Court could give effect to. But the assignment would be perfectly good, though the beneficial interest in the thing assigned, viz. the policy, might sometimes be very small and sometimes very considerable.

I do not therefore doubt that there was here a perfectly good and valid assignment, within the terms of the policy, and that it was made "six months before the death of the assured."

The next question is, what is the construction of the letter, because, if it is only a security for money then

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actually due, it will not cover subsequent advances. Though this is obscure, I do not think that such is the construction of the letter; but the parties themselves, in their subsequent dealings, seem to have put a construction on it of which it is susceptible, and which is favorable to the Plaintiff's claim. The policy is to be held as a security, in case of death, "for any notes of hand or bills of exchange you may have cashed for me." This means not "*now*," but "*then*," that is, at any time when the event may occur. The policy was not taken back when the sum actually due at the date of the letter was paid off, but it continued for more than three years in the hands of the Plaintiff, and the parties continued to deal with each other on the same footing and in the same manner as if the policy were a security for the floating balance; and on the death of *Woolcott* there were bills and notes which the Plaintiff had cashed and discounted for *Woolcott*.

I am therefore of opinion, first, that there is a good assignment of the policy, and secondly, that it covers all notes of hand and bills which the Plaintiff may have cashed for *Woolcott* at his death, and consequently, that in respect of these, the Plaintiff is entitled to recover.

Take a decree for what is due on that footing.

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POWELL *v.* HELLICAR.

Dec. 14.

Immediately before her death, the deceased told *A.* to take the keys of a dressing case and box, containing a watch and trinkets, and immediately on her death to deliver the watch and trinkets to the Plaintiff. *A.* did so. *Held*, that this did not constitute a valid *donatio mortis causâ.*

ELIZABETH FUIDGE died on the 13th of *July*, 1858. She was possessed of a watch and various trinkets and other articles which were in her dressing-case, and of certain other trinkets which were kept locked up in a box. The keys of the dressing-case and box were on the same ring, and were always kept by *Elizabeth Fuidge*. In the week immediately preceding her death, *Elizabeth Fuidge*, while suffering under the illness of which she died, and in the immediate expectation of death, who was then staying at *Weston-super-Mare* for her health, told *Mary Fisher* to take the keys of the dressing-case and box, and to keep the same, and immediately after her (*Elizabeth Fuidge's*) death, to deliver the watch and trinkets which were in the dressing-case and box to the Plaintiffs. In accordance with such direction, *Mary Fisher* immediately took the keys and kept them in her sole custody until the death of *Elizabeth Fuidge*, and, after her death, *Mary Fisher* delivered to the Plaintiff *Catherine Elizabeth Powell* the dressing-case and box, with the watch and trinkets therein contained, and the same remained in her possession.

At the time when the keys were delivered to *Mary Fisher*, the dressing-case was in *Elizabeth Fuidge's* room at *Weston*, but the box was at her residence at *Clifton*.

The Plaintiffs insisted, that the gift of the watch and trinkets

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trinkets by *Elizabeth Fuidge* was a good, valid and effectual gift, as a *donatio mortis causâ.*

Mr. *R. Palmer* and Mr. *Freeling* for the Plaintiff, argued that there had been a good symbolical delivery, to the common agent of both parties, by the deceased, while in the expectation of approaching death, and that this constituted a good, valid and effectual gift of the watch and trinkets as a *donatio mortis causâ.* They cited *Duffield* v. *Elwes* (*a*); *Bouts* v. *Ellis* (*b*); *Snellgrove* v. *Baily* (*c*).

Mr. *Selwyn* and Mr. *Lindley*, for the Respondents, were stopped by the Court.

The MASTER *of the* ROLLS, after referring to *Bunn* v. *Markham* (*d*); *Farquharson* v. *Cave* (*e*), and *Reddel* v. *Dobree* (*f*), said, that he could not hold this to be a good *donatio mortis causâ*, for there had been no delivery.

(*a*) 1 *Bli.* (*N. S.*) 497; 1 *Sim. & Stu.* 239.
(*b*) 17 *Beav.* 121.
(*c*) 3 *Atk.* 214.
(*d*) 7 *Taunt.* 224.
(*e*) 2 *Colly*, 356.
(*f*) 10 *Sim.* 244.

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Re FAULDING'S TRUST.

Dec. 21.

Bequest to my niece and such of my nephews and nieces as shall be then living, and the children of such of them as shall be then dead, such children to be entitled only to the part of their parents. *Held*, that the children of a nephew who died in the life of the testatrix participated.

THE testatrix made her will in *December*, 1825, and died in *January*, 1826, and the question arose upon the construction of her will.

She gave her real and personal estate to trustees, in trust to sell, convert and invest the produce, and after payment of annuities to her brother, upon trust to pay and divide the remainder "unto my niece *Elizabeth Chapman*, and such of my nephews and nieces as shall be then living, and the child and children of such of them as shall be then dead, in equal shares and proportions and amounts, in common, and not as joint tenants, such child or children to be entitled only to the part, share and proportion of his or their parent or respective parents," and to be paid "as and when" they shall severally attain twenty-one years, with interest for the same in the meantime, towards his, her or their education and support."

The state of her family was this:—She had three nephews and one niece, of whom *Henry* died in her lifetime, leaving six children.

Mr. *Jessel* contended that the children of *Henry* were excluded; for that they took by substitution for their father, who being dead at the testatrix's death, could not himself have taken; *Christopherson* v. *Naylor* (*a*); *Butter* v. *Ommaney* (*b*); *Peel* v. *Catlow* (*c*); *Gray* v. *Garman* (*d*); *Tytherleigh* v. *Harbin* (*e*).

The

(*a*) 1 *Mer.* 320.
(*b*) 4 *Russ.* 70.
(*c*) 9 *Sim.* 372.
(*d*) 2 *Hare*, 268.
(*e*) 6 *Sim.* 329.

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[*The* MASTER *of the* ROLLS referred to *Ive* v. *King* (*a*).]

Mr. *Horsay*, in the same interest.

Mr. *Keene* and Mr. *Yool*, *contrà*, were not heard.

The MASTER *of the* ROLLS.

I think that *Henry's* children take a share. In the view I take of this case, I do not think that *Butler* v. *Ommaney* and *Tytherleigh* v. *Harbin* are irreconcilable, or that it necessarily follows that if one stands the other must fall. The view I took of the point in *Ive* v. *King* (*a*), I am still disposed to adopt. It is thus stated in page 53 of the report of that case, "The distinction which is to be found in cases of this description is to this effect:—If a testator give a legacy to a class of persons, such as the children of *A.*, and goes on to provide, that in case of the death of any one of the children of *A.* before the period of distribution, the issue of such child shall take their parent's share; such issue cannot take unless the parent might have taken, and consequently, if a child of *A.* be dead at the date of the will, or at the death of the testator, the issue of that child cannot take anything. This is the principle I have already stated in *Coulthurst* v. *Carter* (*b*) to be established by *Peel* v. *Callow* (*c*); *Waugh* v. *Waugh* (*d*); *Christopherson* v. *Naylor* (*e*), and many other cases."

"But if the original legacy be not to a class, but to a named individual legatee, with a direction that in case of death of the legatee before payment, the legacy is to go to another person, although the death of the legatee

(*a*) 16 *Beav.* 46.
(*b*) 15 *Beav.* 421.
(*c*) 9 *Sim.* 372.
(*d*) 2 *Myl. & K.* 41.
(*e*) 1 *Mer.* 320.

legatee occurs before the death of the testator, the gift over takes effect upon the presumption that such ulterior legatee was substituted in order to prevent a lapse of the legacy. This is decided in *Miller* v. *Warren* (*a*); *Darrel* v. *Molesworth* (*b*), in *Houghton* v. *Harrison* (*c*), in *Machinnon* v. *Peach* (*d*), and in several other cases."

In *Butter* v. *Ommaney* (*e*) the case was of this description:—The residue was given to be equally divided between the children of his brother *Joseph* and his late sister *Betty*, and late brother *Jacob*, "who should be then living." These were the class of persons to take. "And as to such of them as should be then dead, leaving a child or children, such child or children were to be and stand in the place or places of his, her or their parent or parents." The Vice-Chancellor held, that the children of such children of the brothers and sisters of the testator as died in the testator's lifetime were not entitled. But this will appears to be quite distinct from that. The words here are:—"to my niece *Elizabeth Chapman*, and such of my nephews and nieces as shall be then living, and the child and children of such of them as shall be then dead." This is the class of persons to take; it is not as if she had said "to *Elizabeth Chapman* and my nephews and nieces who shall be then living, and as to such of them as shall be then dead leaving children, such children are to stand in the place of the parent." But the testatrix puts amongst the class of persons who are to take the children of deceased nephews and nieces; and she puts them, in this respect, exactly in the same situation as she had *Elizabeth Chapman* and her nephews and nieces then living. He then goes on to direct what shares the various members of the class are to

(*a*) 2 *Vern.* 207.
(*b*) *Ibid.* 378.
(*c*) 2 *Atk.* 329.
(*d*) 2 *Keen*, 555.
(*e*) 4 *Russ.* 70.

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Re FAULDING'S TRUST.

to take as between themselves, and he directs that such children are not to take equal shares with the nephews and nieces, but the children of a nephew and niece are only to take amongst them such share as the parent would have taken. That appears to me to distinguish this case from *Butter* v. *Ommaney*, and to make it clear that the testator intended that the children of a deceased nephew should take.

Declaration that the children of *Henry* take one-fourth

CANHAM *v.* NEALE.
COBBOLD *v.* NEALE.

Dec. 15.

Form of decree as to costs in the case of two creditors' suits, when one is stayed after a decree in the other.

THESE were two creditors' suits, and the usual decree had been made in the second suit, on the 5th of *June*, 1858.

By an order made in both causes, on the 7th of *July*, 1858, the proceedings in the first suit were stayed, and the Plaintiff in the first suit was to have his costs down to the time when he had notice of the decree.

The minutes, as drawn, ordered *Canham's* costs to be paid, by the administrator, if he had assets, but if he had not, and on affidavit that he had none, *Canham* was to be at liberty to add his costs to his debt, and go in and prove his claim, and the amount of his taxed costs under the second suit (*a*).

Mr. *Greenside*, for *Canham*, now asked that the order might direct payment to him of his costs. He contended

(*a*) *In the form of the decree in West* v. *Swinburne, Seton on Decrees, p.* 464, *n.* (*2nd edit.*)

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CANHAM v. NEALE. COBBOLD v. NEALE.

contended that such was the usual practice on staying proceedings in these cases and in the like instances of creditors suing the executor at law. That it would not be just to pay *Canham* merely a dividend on the costs which he had properly incurred in his suit, and in which, if prosecuted to a decree, he would, in the case of a deficiency of assets, have been entitled to his full costs, in the first instance. He referred to the Form IV. in *Seton on Decrees*, to shew, that, at least, he was entitled to his costs *pari passu* with the Plaintiff in the second suit, and observed, that it might be true that the administrator had no assets to-day, and yet he might have ample assets to-morrow. He cited *Taylor* v. *Southgate* (*a*); *Frowd* v. *Baker* (*b*).

Mr. *Marten*, for the Defendant, was not heard.

The MASTER *of the* ROLLS.

I am of opinion that the order is correct as it stands, and I have often made orders in the same form, when I have been informed that there were no assets. I am not precluded by this order from ultimately directing payment of these costs out of the estate, and the leave given to *Canham* to go in, in the other suit, will give him an opportunity of applying for them.

If I ordered the administrator personally to pay them, it might give rise to much litigation and injustice. I must refuse this motion with costs.

(*a*) 4 *Myl. & Cr.* 203. (*b*) 4 *Beav.* 76.

NOTE.—*See West* v. *Swinburne*, 19 *L. J., Chan.* 81; *Duffort* v. *Arrowsmith*, 7 *De G., M. & G.* 434; *Morshead* v. *Reynolds*, 21 *Beav.* 638; *The Earl of Portarlington* v. *Damer*, 2 *Phill.* 262.

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DURANTY'S CASE.

In re THE LIVERPOOL BOROUGH BANK.

Nov. 20.

Where, by false representations of the directors of a company, a stranger is induced to take shares directly from the company, the transaction is not binding in equity, and he is not a contributory. But if, by such representations of the directors, he takes them from a third party, he is a contributory.

THE above bank was established in 1836, and on the 17th of *October*, 1857, it stopped payment. It was registered on the 11th of *November*, 1857, under the Joint-Stock Banking Companies Act, 1857 (*a*), and on the 12th of *November*, 1857, resolutions were passed dissolving the company (except for the purposes of winding-up), and determining that the company should be wound up voluntarily, under the Joint-Stock Banking Companies Act, 1857. A petition was subsequently presented for the continuance of the voluntary winding-up, and on the 21st of *December*, 1857, an order was made accordingly, "with liberty for the creditors, contributories, liquidators and all other parties interested to apply to this Court as they might be advised."

At the time of the registration (11th *November*, 1857), Mr. *Duranty* was returned as a holder of 151 shares. A call of 5*l.* a share having been made on Mr. *Duranty*, he resisted it on the ground of fraud, and the summons was adjourned into Court for argument.

It appeared that he had, through a broker, purchased the 151 shares in *August* and *October*, 1857, from third parties, by whom they had been assigned to him. The transfers had been duly recorded in the books of the bank, and certificates that Mr. *Duranty* was the proprietor of the shares, in the form prescribed by the deed

(*a*) *Sect.* 23.

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deed of settlement, were delivered to him; the last having been delivered on the 19th of *October*, 1857, just prior to the bank suspending payment (27th *October*, 1857).

The case made by Mr. *Duranty* was this:—That from 1850 to the stoppage of the bank, half-yearly reports had been published and circulated by the bank, which he had seen. These purported to shew a most flourishing business, fully equal to the payment of a dividend of 7*l.* per cent., besides retaining a large reserve fund.

That in *July*, 1857, the directors published a report of the affairs of the bank and its state and position, and that, on the faith of the truth of that report, he was induced to purchase these shares. That he had since discovered, that the report was false and erroneous, and that it had been proved to be so on the trial of an action of *Scott* v. *Dixon* (*a*), in which *Scott* had recovered from a director the full amount of his purchase-money on his shares, on the ground of fraudulent misrepresentations contained in that report.

Mr. *Follett* and Mr. *Bardswell*, for Mr. *Duranty*, argued that he was not a contributory, for he had been induced by the fraudulent misrepresentations of the directors as to the affairs of the company to become a shareholder; and that these having been made in the report of the directors, the company at large were responsible for them. That it had been decided in *Ayre's Case* (*b*), that when a person takes shares in a company through false representations, he will not be placed on the list of contributories, if the misrepresentation be made by the company, and that a company

(*a*) *Q. B.*, 1859. (*b*) 25 *Beav.* 513.

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pany will be answerable for the misrepresentations made in a report of the directors. They also cited *Burnes* v. *Pennell* (*a*); *In re The Royal British Bank, Ex parte Brockwell* (*b*); *The National Exchange Company of Glasgow* v. *Drew* (*c*); *Scott* v. *Dixon* (*d*).

Mr. *R. Palmer* and Mr. *Giffard*, for the Official Liquidators, were not called on.

The MASTER *of the* ROLLS.

I think the resistance of Mr. *Duranty* is founded upon a complete misapprehension of the nature of these cases. It is, therefore, very important that it should be clearly understood, and I will endeavour to explain the grounds upon which I proceed in these cases.

The rules as to shareholders and contributories are not new, nor have they been introduced since the Winding-up Acts; they are merely the application of the existing rules of equity, which have long prevailed where persons have been induced to enter into contracts by misrepresentations.

It is important to keep in mind the distinction between the parties to the contract and third persons; between the case where the false representations are made by one of the parties to the contract and where they are made by third persons. If a party to a contract make a false representation to another, and thereby induces him to enter into the contract, Courts of Equity will set it aside and declare it absolutely void, and remit the parties to it exactly the same situation in which they were before the contract. But if a third person,

(*a*) 2 *H. of L. Ca.* 497.
(*b*) 26 *L. J., Ch.*, 855.
(*c*) 2 *Macq.* 103.
(*d*) *Q. B.* 1859.

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person, by representing to *A*. that it will be highly for his benefit, and by false representations induces him to enter into a contract with *B*., but *B*. makes no false representation, and is neither party or privy to any such, then the contract is valid, and stands good in this Court. But the person who, by false representations, induced the other to enter into that contract is liable, in an action, to make good to the person he has misled the damage he has sustained by acting on the misrepresentation made to him. Now that really is the key to the whole of these cases; and I have, upon various occasions, endeavoured to explain this as clearly as I could.

Many cases have occurred in this Court, in which a person has been induced to become an original shareholder in a joint-stock company, upon the false representations made by another shareholder in the company, who told him that it was an excellent and thriving concern, that it would be a most advisable speculation, and by a series of false representations has induced him to take shares. When it afterwards turned out that it was a very bad speculation, then shareholders have sought to be relieved from being made contributories, upon the ground that they had taken the shares, trusting to the false representations of a third person. This Court has always held such persons to be shareholders and contributories, and has said, "You did not take the shares from the person who made these representations to you, but directly from the directors of the company, who made no false representations to you and was privy to none; you are a shareholder, and consequently a contributory in the company, and your only remedy is by an action at law against the person who induced you by false representations to take these shares."

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In *Bell's Case* (*a*), a company in insolvent circumstances had published and circulated a great number of false representations, promising very great advantages to persons becoming shareholders. Mr. *Bell*, on the faith of these representations, took shares from the company, which stopped immediately afterwards, and a winding-up order was made. It was there argued, that the case came under the rule I have just referred to as to false representations, and that *Bell* was a contributory. I held the contrary. I said, here the company itself, by its directors, has entered into a contract with *Bell*, and therefore the old rule of equity prevails, viz., that when one party to a contract, by false representations, induces others to enter into it, that contract is void, and the party making the misrepresentations can derive no benefit from it.

So also in *Ayre's Case* (*b*), where a person was induced, by a printed report of the directors, to subscribe for and take shares from the directors, I held that it was a contract entered into by the directors for the company, and that the false representations avoided it.

But here the contract was entered into with a third person, who I assume to have been a *bonâ fide* shareholder, and it was a contract between Mr. *Duranty* and the holder of certain shares. If the vendor had made any false representation to Mr. *Duranty*, or if he had been cognizant of any false representations made to him on the strength of which Mr. *Duranty* bought the shares, and the vendor had fostered and encouraged those false representations, then Mr. *Duranty*, as against him, would have been at liberty to set aside this contract, and to call on him to take back the shares which, from

(*a*) 22 *Beav.* 35. (*b*) 25 *Beav.* 515.

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from a false representation, he had induced him to buy. But the shares would still have remained shares in the company, and having been *bonâ fide* shares originally, they could not be made bad by the owner of them dealing fraudulently with them; in the case supposed, they would have been restored to the vendor, who, by false representations, attempted to sell them, and, on the winding up of the company, the person who had attempted to sell them would have been liable in respect of them as a contributory.

Observe what would be the consequence of an opposite doctrine; the shareholders, in general, have subscribed upon the strength of a great number of shares having been taken by solvent and responsible persons, but if it were held that Mr. *Duranty* is not a contributory or shareholder, the effect will simply be to destroy or cancel his shares, for they could not be forced back on the vendor, because, on his part, the transaction was *bonâ fide*, and thus the burthen of the liabilities of the company would be increased and thrown on the other shareholders, who might have trusted to these very shares, amongst others, having been taken by *bonâ fide* shareholders.

I now come to consider what is the consequence of the false representations made by the company. The directors have made false representations, which have induced Mr. *Duranty* to buy these shares. I accede to the argument, that the report of the directors is the report of the company. But the observation which I formerly made, that the agent of a company is not its agent for the purpose of committing a fraud, also applies, for this purpose—that the misrepresentations of the directors do not render the company liable in an action of deceit for making those false representations.

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This is an action of tort, and involves a moral culpability. The directors are agents of the company simply for the purpose of contract, and in all matters relating to contracts their acts bind the company; and if they make a false representation to *A.*, and thereby induce him to enter into a contract with the company, the contract will be void, and the company will be bound by their representations; but not so with respect to contracts entered into between other persons, although founded on their representations, that if any thing rests in action against the company. The directors are not the agents of the company to commit a fraud. The distinction between the two cases is obvious, the moment that, by issuing a report, which is the report of the company, the directors induce persons to enter into a contract with them, that contract may be set aside. But if they, by that report or otherwise, induce other persons to enter into contracts with third persons, that contract is not rendered void, and the company does not thereby become liable to an action for deceit, although the directors themselves, severally and individually, who made that misrepresentation, do become liable to an action for deceit in consequence of the report which they have so issued. That really is the distinction which prevails in these cases, and which is important to be borne in mind.

The case of *Scott* v. *Dixon* (*a*) really proves this as plainly and distinctly as possible. It was an action brought, not against the company, but against directors, for issuing a false report, by reason of which the Plaintiff had been induced to become a shareholder. He bought the shares *bonâ fide* from another shareholder, and in consequence he became subject to all the liabilities which attached to a shareholder, and accordingly, in

(*a*) *Q. B.*, 1859.

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in the estimate of his damages, he claimed the amount of calls paid by him in his character of shareholder and contributory, because, having become a shareholder from another person by a *bonâ fide* contract, he was, by reason of that contract, obliged to pay the calls. But Mr. *Duranty's* position is this:—he has been induced, by false representations, to become a shareholder in the company, and he remains a shareholder. The shares are perfectly good shares and are not annihilated by the fact that he bought them from a *bonâ fide* shareholder through false representations. He must therefore bear the consequences of being a shareholder, and must pay the calls. But assuming, which I do, *Scott* v. *Dixon* to remain law, he has his action of deceit, or for damages, against the person who made those representations, upon the faith of which, and relying upon and believing them to be true, he entered into the contract which has made him a shareholder and contributory, and liable to pay the calls.

I do not think it necessary to proceed further upon the subject, but observe what the consequence would be if every person who had bought shares since the false representations were made, that is, since the report was published, were held not to be shareholders of the company, and the vendors could not be recalled to their position as shareholders. If such sales had taken place to any very considerable extent, the few remaining shareholders and probably the creditors of the company would be utterly ruined.

I am of opinion that Mr. *Duranty* must remain on the list of contributories.

NOTE.—A similar decision was made by Lord Ordinary *Kinlock*, in *Ingles* v. *The Liquidators of the Western Bank*, *L. T.* (1859).

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Dec. 6.

Directors of a company were prohibited giving bills of exchange; but they had powers to borrow on mortgage. They however gave bills to secure an existing debt, and a mortgage was, at the same time, executed, under the seal of the company, which was made subject to redemption on payment of the bills:—*Held*, first, that the mortgage was given to secure the debt, and not the payment of the bills, and therefore was not invalid on that account; and, secondly, that upon a bill of foreclosure by the mortgagee, the deed of the company must be treated as valid, until set aside by an independent proceeding.

THIS bill was filed by the builders of the Royal *Surrey* Music Hall, to establish their claim as first mortgagees for 5,000*l.* on the property.

The Defendants, the Royal *Surrey* Gardens Company (limited), was a company formed, and provisionally registered, with limited liability, under the Limited Liability Act, 1855, in the month of *December*, 1855, under the title of the "*Royal Surrey Gardens Company, limited.*" The company was completely registered under the Act on the 12th of *April*, 1856, and on the 4th of *September*, 1856, it was duly registered under the Joint Stock Companies Act, 1856.

By an indenture dated the 21st of *October*, 1856, certain leasehold premises, known as the Royal *Surrey* Zoological Gardens, were conveyed and vested in the company.

The deed of settlement of the 19th of *March*, 1856, empowered the directors to build any hall or buildings as they should think proper, and for that purpose, "to enter into such contracts or arrangements with architects, builders, &c." as they might think proper.

The 90th clause provided as follows:—That the directors shall not issue or accept any promissory notes or bills of exchange for or on behalf of the company.

The 91st clause authorized the directors to borrow 20,000*l.*

20,000*l.* for the purposes of the company, and "to raise all and singular such sum and sums of money, on the security of the company, or the property of the company, or any portion thereof, on such terms and in such manner as the directors might think proper, and for that purpose, to make and execute any mortgage or other pledge under the common seal of the company," and with such power of sale and special provisoes as the directors should deem reasonable, or by bond under the common seal of the company; and the person or persons advancing the moneys were not bound to inquire into the occasion of such loan, or into the validity of the resolution, if any, of the boards of directors, or of the general meeting authorizing the same. And, except as aforesaid, it should not be lawful for the company, or for the directors on behalf of the company, otherwise than in the ordinary course of business, and for the current expenditure of the company, to contract any debt or debts whatsoever.

The 92nd clause was as follows:—"That, for the further security of the directors of the company, all deeds under the common seal of the company shall be binding on the company in any Court of law or of equity, and the company shall not be at liberty to dispute any statement therein contained, or to allege, in bar thereof, any irregularity in the manner in which the same was obtained."

On the 27th of *February*, 1856, the Plaintiffs Messrs. *Scott* and *Cornwall* entered into a contract with the committee, for building the Music Hall for 17,000*l.*, of which the payment of 5,000*l.* was to be postponed. The contract was ratified by the directors, and afterwards by the company under their seal, on the 24th of *April*, 1856.

The

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The Plaintiffs completed the contract, and the balance of 5,000*l.* was secured by thirteen bills of exchange accepted on behalf of the company, and by a mortgage of the gardens and property.

The mortgage was dated the 6th of *November*, 1856, and was made between the company of the one part, and the Plaintiffs of the other part. It recited, that there was due from the company to the Plaintiffs *Scott* and *Cornwall*, "in respect of such buildings, works and materials, under certain contracts entered into between the parties thereto, a sum exceeding 5,000*l.*, and that *Scott* and *Cornwall* had consented and agreed to accept payment of the said sum of 5,000*l.*, by certain bills of exchange which had been accepted on behalf of the company and delivered to *Scott* and *Cornwall*." It then proceeded thus:—"Now it is hereby witnessed, that for further securing the payment of the said principal and interest moneys, at the maturity of the said several bills of exchange given for the same as aforesaid, the company hereby grant, assign and demise to *Scott* and *Cornwall*, and their executors, administrators and assigns, all &c. [*describing the property*], for all the term or terms of the company therein, together with the rights of renewal of the company, subject, nevertheless, to redemption by the company on payment of the above-mentioned thirteen bills of exchange, when and as the same shall become due." The deed also contained a declaration that the security so given should not deprive *Scott* and *Cornwall* of any remedies which they might otherwise have had for the recovery of the sum of 5,000*l.* and interest.

On the 7th of *December*, 1856, the company executed a second mortgage for 5,000*l.* to the Defendant *Colburn*.

On

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On the 19th of *February*, 1858, the company was ordered to be wound up.

This suit was instituted by *Scott* and *Cornwall*, the first mortgagees, against *Colburn*, the second mortgagee, the company, the official liquidator and the representatives of *Coppock* (the chairman), praying a declaration of the Plaintiffs' rights and a foreclosure.

Mr. *R. Palmer* and Mr. *Hemming*, for the Plaintiffs.

Mr. *Follett* and Mr. *Bristowe*, for *Colburn*.

Mr. *C. C. Barber* and Mr. *Leaf*, for the company and official liquidator.

Mr. *Selwyn* and Mr. *J. H. Palmer*, for the representatives of *Coppock*.

For the defence it was argued, first, that the Plaintiffs' mortgage was given to secure bills of exchange, which the directors were, by the deed of settlement, expressly forbidden to accept on behalf of the company, and that the mortgage, being given in order to effect an illegal purpose, was void.

Secondly, that there was no powers to give a mortgage for an antecedent debt, but only for a loan of money.

The MASTER *of the* ROLLS.

There are two objections taken to the validity of the Plaintiffs' mortgage deed of the 6th of *November*, 1856. The first is, that it is a mortgage made for the purpose of

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of securing payment of certain bills of exchange, and by the deed creating the company the directors are prohibited accepting bills of exchange for the company; and therefore (it is argued) the deed was made for the purpose of effecting a void purpose. But I am of opinion, that the object of the deed is not to secure payment of the bills of exchange, but to secure the payment of the 5,000*l.* and interest due to the Plaintiffs.

It is true, that the assignment is made subject to a proviso for redemption, "on payment of the abovementioned thirteen bills of exchange, when and as the same shall become due." The reason for that was, that the deed previously recited, that the Plaintiffs had agreed to accept payment of the 5,000*l.* by bills of exchange. Assume the agreement to have been illegal, still if the bills had been paid *cadet questio;* for it would then have become immaterial, whether payment of them could or could not have been enforced.

But if the bills remained unpaid, the only question would be, whether there would not be a right of redemption on payment of the 5,000*l.* under the deed, instead of under the bills? I should have little doubt that there would be.

This is matter of strict right, and I am bound to treat it in the strictest manner, but there can be no doubt that the money was expended on the very object for which this company was formed, viz., to erect this building for the purpose of profit; therefore, a perfectly good consideration was given for the mortgage, namely, work and materials. All this being established, and a mere technical objection being raised to the validity of the mortgage, I must see if it applies.

I think

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I think it does not, and that this is not a mortgage to secure bills of exchange, but to secure the payment of the principal and interest actually due to the Plaintiffs, but for the payment of which, it is recited, that bills had also been given.

The second objection is of a different description. It is, that no mortgage at all could be given for this debt, and I am disposed to agree with that argument (*a*). But whether this was or was not a valid equitable charge on the property, or whether the company are not to be estopped by the recitals in their deed, it is not necessary to consider, because I am of opinion that the legal estate passed by the deed. It is not the deed of the directors but a conveyance to the Plaintiffs by the company, in whom the estate was vested, to secure a debt due. The seal of the company is affixed to the deed, then on what principle can it be stated that this deed did not pass the estate? Assume it to be fraudulent, still a bill must be filed to set it aside, and, therefore, in this suit I am bound to assume its validity. It passed the legal estate, and the burthen of proof lies on the Defendants to shew that the Plaintiffs are not entitled to hold it for the purpose of payment of their debt.

I proceed on the ground that I am bound to consider it valid. It is for the interest of *Colburn* that I should hold so, for every argument in favor of making the Plaintiffs' mortgage void would be applicable to *Colburn's* mortgage. I will not make any declaration, but I will direct an account of what is due on the Plaintiffs' mortgage, and inquire what other mortgages there are on the property, and what are their priorities.

(*a*) *See Ernest* v. *Nicholls*, 6 *H. of L. Cas.* 401.

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BIDDLE *v.* JACKSON.

Nov. 13, 22.

A ward of Court married ten days after attaining twenty-one. The Court declined ordering her fortune to be paid out of Court, on her consent, but directed it to be settled.

A SUM of money was standing to the credit of this cause, belonging to a ward of Court. She attained twenty-one on the 10th of *August*, 1858, and married Mr. *Jackson* on the 24th of the same month. A petition was presented by Mr. and Mrs. *Jackson* for payment out of Court of the fund, on her separate examination and consent.

Mr. *Dean*, in support of the petition.

The MASTER *of the* ROLLS declined making any other order than a reference to chambers to approve of a settlement.

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Mr. *Dean* applied to have the case re-heard, as, upon the authorities, no contempt had been committed by a marriage after the lady had attained twenty-one, and if so, he argued that she was entitled to direct how her own fund was to be disposed of.

The MASTER *of the* ROLLS said, it would be useless to re-hear the petition, for, in his opinion, a party who postponed his marriage with a ward of Court, for the express purpose of avoiding its jurisdiction, was guilty of a contempt.

NOTE.—The case was heard upon appeal by the Lords Justices on the 23*rd November*, 4*th December*, and 11*th* and 24*th* of *January*, 1859, who refused to do more than order payment of the income to Mr. *Jackson* during their joint lives or until further order, without prejudice to any question, with liberty to apply.

See Long v. *Long*, 2 *Sim. & St.* 119; *Austen* v. *Halsey*, *ibid. note*; *Ball* v. *Coutts*, 1 *Ves. & B.* 292; *Money* v. *Money*, 3 *Drew.* 256; *Anne Walker's Case*, 1 *Ll. & Goo.* 323; *Martin* v. *Foster*, 7 *De G., M. & G.* 98; *Hobson* v. *Ferraby*, 2 *Coll.* 412; *Leeds* v. *Barnardiston*, 4 *Sim.* 558; *Hodgens* v. *Hodgens*, 4 *Cl. & Fin.* 323; *Cook* v. *Fryer*, 1 *Hare*, 498.

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November 16.
December 6.

A Defendant who disclaims in a suit cannot, in that suit, maintain a claim against his co-Defendant in respect of the right disclaimed.

COLONEL *WAUGH* on the 12th of *October*, 1855, mortgaged his *Branksea* Estate to the Plaintiff *Jolly*.

As a further security, and by an indenture dated the 12th of *October*, 1855, Colonel *Waugh* and the Plaintiff appointed *Aplin* receiver of the rents, and Colonel *Waugh* attorned tenant to *Aplin*, at a rent of 3,500*l*., which was to be applied in payment of the mortgage.

Afterwards, on the 14th of *March*, 1857, Colonel *Waugh* executed a bill of sale of the goods and chattels on the estate to *The London and Eastern Banking Company*.

On the 15th of *April*, 1857, Colonel *Waugh* was declared bankrupt, and on the 28th of *April*, *Aplin*, under the deed of 1855, distrained the chattels upon the estate for 3,500*l*., and he realized the amount. In this suit, that sum was claimed by the Plaintiff on the one hand, and by the assignees of Colonel *Waugh* on the other.

The *London* and *Eastern* Banking Company, who were made Defendants to the bill, disclaimed all interest.

At the hearing, the Master of the Rolls decided that the Plaintiff had no right to the 3,500*l*., and that it ought to be paid to the assignees.

Mr. *Follett*, for the *London* and *Eastern* Bank, then argued, that their title under the bill of sale was clearly paramount

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paramount to that of the assignees of the bankrupt. That the disclaimer of a Defendant had reference only to the rights of the Plaintiff, with whom he was in contest, and did not affect his rights against co-Defendants, with whom there was no issue pending, and whose rights *inter se* could not be determined in the suit. He asked an inquiry, which would raise the issue of priority between the Defendants.

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I cannot accede to your request. The Court requires a Defendant, if he makes a case against a co-Defendant, to state that case; and then, though the Court does not decide the question between them at the hearing, it puts it in a course of litigation, in a similar manner to what is done when a bill of interpleader is filed. But when a bill is filed against two or more Defendants, and one disclaims all right and title to the subject in litigation, then, at the hearing, the bill is simply dismissed as against the disclaiming Defendant, and the Court only determines the rights and interest of the remaining parties.

Whether the disclaimer will affect any proceeding which may be taken hereafter, or whether a disclaiming Defendant is to be treated as if he had not been made party to the bill, is a question on which I shall not express an opinion.

On the present state of this record, however, I shall make a decree, declaring that the assignees of Colonel *Waugh* are entitled to the 3,500*l.*

NOTE.—On appeal (26*th May*, 1859), Lord *Chelmsford*, L. C., held, that the Plaintiff was entitled to £2,700 (the rent due at the time of the distress); but he affirmed the above decision as to the disclaimer.

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MAYNARD *v.* WRIGHT.

Dec. 9, 20.

THE testator bequeathed his personal estate to his executors, in trust for his wife for her life, and after her decease upon trust to pay and divide it as follows:— "Between and among my sons and daughters, namely, *Henry Maynard*, *George Maynard*, *Robert Maynard*, *Emma Mary Ann Wright*, *Eliza Maynard* and *Clara Maynard*, or such of them as shall be then living, and the issue of such of them as shall be then dead leaving lawful issue then living (such issue to take their deceased parent's share)."

"Provided also and I direct, that if any of my said children shall die before they shall become entitled to their respective shares, without leaving issue of his or her body who shall live to acquire a vested interest in his or her share of the said trust premises, then the share of him or her so dying, as well original as accruing, shall go and accrue to the survivors and survivor of my said children and their issue (taking as aforesaid) in equal shares."

He devised a freehold in trust, to accumulate the rents for periods of not less than ten years successively at a time, at the expiration of which, the accumulations to be paid to the testator's "sons and daughters, or such of them as should be living at the respective periods of division, and the issue of such of them as shall have died leaving lawful issue, such issue taking their deceased parent's share, to be vested interests in the same respectively at the age of twenty-one years, and so on from time to time until the expiration of twenty one years after the decease of the survivor of her children. And from and after the expiration of the term of twenty-one years, he devised the same premises unto such of his grandchildren and their issue as should then stand, in respect to him, in equal degree of consanguinity, and their heirs, as tenants in common. *Held*, that "issue" was to be read "children," and the word "and" to be read "or," and that the devise was neither void for remoteness nor uncertainty.

The word "issue" restricted to "children" by force of the co-relative expression "parent."

The word "and" construed "or," in order to give effect to the obvious meaning.

Gift to "my grandchildren and their issue as shall stand, in respect to me, in equal degree of consanguinity. *Held*, not void for uncertainty, the sentence being read in the alternative.

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He devised a freehold messuage and premises, called *Maynard's Cottage*, to trustees for his wife for her life, and after her decease "to let and demise the same, either from year to year or on lease, for any term not exceeding five years, as they or he may deem most advantageous to my children, and from time to time to collect and receive the rents and profits thereof, and invest the same in one or more savings' bank or banks, at interest, to *accumulate* for periods of not less than ten years successively at a time, computing from the decease of my said wife, at the expiration of which periods, respectively, the same rents and profits and the accumulations thereof to be equally paid and divided to and among my said sons and daughters or such of them as shall be living at the time of the said respective periods of division, *and* the issue of such of them as shall have died leaving lawful issue, such issue taking their deceased parent's share, to be vested interests in the same respectively at the age of twenty-one years, and so on, from time to time, until the expiration of twenty-one years after the decease of the survivor of my said children. And from and after the expiration of the said term of twenty-one years, I give and devise the same premises unto such of my *grandchildren* and their issue as shall then stand in respect to me *in equal degree of consanguinity*, to hold to them, their heirs and assigns for ever, as tenants in common and not as joint tenants, it being my wish and desire that the premises shall continue in my posterity as long as the rules of law will admit."

The testator died in 1841, and his widow in 1847.

The Plaintiff, *Henry Maynard*, as heir at law of the testator, claimed to be entitled to the freehold house and premises, as from the period of the death of *Charlotte*

lotte Maynard, the widow of the testator, by reason of the devise and the trusts declared thereof subsequent to the death of the said *Charlotte Maynard* being, as he alleged, void from remoteness.

Mr. *R. Palmer* and Mr. *Langworthy*, for the Plaintiff, argued, first, that the "issue," however remote, were part of the class to take, *Ross* v. *Ross* (*a*), and that therefore the devise was too remote. They referred to *Robinson* v. *Sykes* (*b*); *Tregonwell* v. *Sydenham* (*c*).

Secondly. That the gift was void, in consequence of the uncertainty of the objects to take, for "grandchildren and their issue" could never stand "in equal degree of consanguinity," in respect to the testator.

Mr. *Lloyd* and Mr. *Humphrey* for the testator's daughter *Emma*. Issue must be construed children; *Sibley* v. *Perry* (*d*); *Pruen* v. *Osborne* (*e*). The word *parent* restricts the meaning of the word issue to the *children* of that parent; *Ross* v. *Ross* (*a*).

[*The* MASTER *of the* ROLLS referred to *Greenwood* v. *Roberts* (*f*); *Gooch* v. *Gooch* (*g*).]

Secondly. In the sentence "my grandchildren and their issue" the word "and" must be read "or," and then the expression must mean that a class taking concurrently must stand in equal degree of consanguinity to the testator.

Mr. *W. H. Terrell* for the son *George*: The *Thellusson*

(*a*) 20 *Beav.* 645.
(*b*) 23 *Beav.* 40.
(*c*) 3 *Dow.* 194.
(*d*) 7 *Ves.* 522.
(*e*) 11 *Sim.* 132.
(*f*) 15 *Beav.* 92.
(*g*) 14 *Beav.* 565.

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lusson Act is inapplicable; *Edwards* v. *Tuck* (*a*); *Barrington* v. *Liddell* (*b*); *Birt* v. *Sturt* (*c*); *Middleton* v. *Losh* (*d*); *Beech* v. *Lord St. Vincent* (*e*).

Mr. *Bazalgette* for another child: The "issue" of a "parent" must mean his "children," and the word "vesting" means "indefeasibly vesting;" *Taylor* v. *Frobisher* (*f*); *Berkeley* v. *Swinburne* (*g*); *Wimbles* v. *Pitcher* (*h*). The words "in equal degree" must be rejected.

Mr. *R. Palmer*, in reply, referred to *Eyre* v. *Marsden* (*i*); *Ridgeway* v. *Munkittrick* (*k*); *Edwards* v. *Edwards* (*l*).

The MASTER *of the* ROLLS.

Dec. 20. On the part of the heir it is contended, that the devise is too remote, because the class to take consists of two branches, viz., the sons and daughters living at the time of distribution, who are one branch of the class, and the issue of deceased sons and daughters, who are the other branch of the class, and that these two branches constituting the class to take, the members of it are not, it is argued, to take within the period limited for the accumulation of the property, which is within the legal limits, as it does not extend beyond twenty-one years after the death of the surviving son or daughter; but they are only to take vested interests on attaining twenty-one. It is then justly observed, that it may very well be, that at the lapse of twenty-one years after the

(*a*) 3 *De Gex, M. & G.* 40.
(*b*) 2 *De Gex, M. & G.* 480.
(*c*) 22 *L. J., Ch.*, 1071.
(*d*) 1 *Sm. & G.* 61.
(*e*) 3 *Jur., N. S.*, 762.
(*f*) 5 *De Gex & Sm.* 191.
(*g*) 16 *Sim.* 275.
(*h*) 12 *Ves.* 433.
(*i*) 2 *Keen*, 564.
(*k*) 1 *Drury & War.* 93.
(*l*) 12 *Beav.* 97.

the death of the surviving son or daughter, there may be a grandchild or remoter descendant of such son or daughter, forming one of the class to take, who is an infant of tender years, and yet, from the terms of this will, that descendant cannot obtain a vested interest until after the expiration, not only of the twenty-one years limited to take effect on the decease of the surviving son or daughter, but after the lapse of nineteen or twenty additional years of his own infancy.

On the first point I concur with the argument of the Plaintiffs, I think that the class to take is composed both of sons and daughters of the testator and of their issue. But, on the second point, I think that the word "issue" is confined to the children of the sons and daughters of the testator who are mentioned in the will.

The cases on this subject are very numerous, and from the nature of the subject, each being applicable to a different set of words, are not all very easily reconcileable. Some things, however, are clear; on the one hand, it is clear that the word issue is "*nomen generalissimum*," and that it includes the latest descendants, unless its meaning be restricted and cut down by words to be found in the will. On the other hand, it is also clear, that where "issue" are substituted for a "parent," the word *issue* is restricted to the *children* of the *parent* spoken of. But this rule of construction may again be controlled by the general effect and scope of the whole will; and by the use of the word "issue" in other parts of the will, which may enlarge this construction and restore the word to its original comprehensive meaning.

Here the gift is to three sons and three daughters

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named, or such of them as may be living at the period of distribution, and the issue of such as may have died, the issue taking their deceased parent's share. On these words, if they stood alone, it is really undistinguishable from *Sibley* v. *Perry* (*a*). The word parent is clearly equivalent to father or mother, and the deaths spoken of are of named sons and daugbters of the testator. It is therefore just as if he had said, that if any one of my sons and daughters shall have died, the issue of such deceased son or daughter shall take his or her father's or mother's share; clearly, in that case, using the word "issue" as synonymous and co-extensive with "children," but not going beyond it.

It is true, that in a later part of the will, the testator uses the word issue in a less restricted sense; but, for the reasons I am about to mention, when I come to that part of the will, I think that this cannot control what is, in my opinion, the clear effect of the clause I am first commenting upon; and this is confirmed by the general scope and object of the will, to which I shall presently refer, and which would, I think, be defeated, by reading the word "issue," in this first clause, as extending beyond the children of the sons and daughters of the testator.

I think, therefore, that this devise is not too remote, as it is, in my construction, limited to take effect when unborn children of existing persons attain twenty-one.

I now come to the subsequent clause of the gift over, which it is contended by the heir at law is also void, not for remoteness but for uncertainty. The words are these:—"and from and after the expiration of the said term

(*a*) 7 *Ves.* 522.

term of twenty-one years, I give and devise the same premises unto such of my grandchildren and their issue as shall then stand in respect to me in equal degrees of consanguinity."

It was urged by the Plaintiff that this clause, as it stands, is nonsense; that all grandchildren must be in an equal degree of consanguinity to the testator, and that grandchildren and their issue never can be in an equal degree of consanguinity. And it is contended that as he clearly, in this case as in the former, constitutes a class consisting of two branches, with a direction limiting how the members of the class are to take, which direction is wholly inapplicable, it would be mere guess work to determine how they are to take, and that therefore, as the testator's meaning cannot be ascertained, it must be simply rejected, and the heir at law is entitled.

The Court, however, very reluctantly comes to the conclusion, that it cannot discover the meaning of the testator, as expressed in his will, and upon fully considering the sentence, I am of opinion, that the solution suggested by Mr. *Lloyd* is the correct one, and that the conversion of the word "and" into "or" will give a clear and distinct meaning to this sentence. If so altered, the sentence will run thus:—that if, at the expiration of the twenty-one years, there are grandchildren to take, they will take the premises devised; if there are none, then the issue of the grandchildren will take, but not indiscriminately, but only such issue shall take as shall then stand in an "equal degree of consanguinity" to the testator; that is, if there be great grandchildren, they shall take to the exclusion of remoter issue, and so on. This mode of construction assists the construction which I place on the former clause in the will, where I

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held that the gift to the issue of the three sons and three daughters was substitutionary for their parents' share; and this will make the whole will consistent; for then the scope of it is this:—after the death of my wife the property is to accumulate, and be distributed, at intervals of ten years, for my sons and daughters and the adult children of such of them as may be dead, for a period of twenty-one years from the death of my wife. When that period arrives, then the property is to be divided amongst the children of my sons and daughters; in other words, the grandchildren of the testator; but if they should be all dead, then amongst the issue of these grandchildren, standing first in order and in an equal degree of consanguinity to the testator.

This seems to me to be so plain and consistent, that I entertain little doubt that such was the intention of the testator, and then the only question I have to consider is, whether, according to settled rules of construction, the conversion of "and" into "or" is too violent a liberty to take with this will. I am of opinion that the decisions in the books on the subject of this substitution warrant the Court in going to this extent. Further has been done in some cases, where the effect was to render the subsequent branch of the sentence inoperative, as in *Bell* v. *Phyn* (*a*); but the effect of the alteration here is, to give effect and meaning to both branches of the sentence, which, unless by such process, it would be difficult to give any meaning to at all.

(*a*) 7 *Ves.* 453.

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COOPER *v.* HOOD.

Nov. 10.
Dec. 3.

THE Plaintiffs *Samuel T. Cooper* and his brother *J. Arthur Cooper* carried on the business of iron masters with the Defendant *Hood*, at the *Leeds Iron Works*. The Defendant was entitled to two-thirds of the profits, and the Plaintiffs, together, to the remaining one-third; and they had all a very considerable capital embarked in the concern.

The terms "goodwill, &c.," in a contract for the sale of a foundry, are not so uncertain as alone to prevent a decree for specific performance of it; for the words *et cætera* point to things necessarily connected with and belonging to the goodwill, and to be defined in the conveyance.

Specific performance of an agreement to purchase one-third of a foundry refused, on the ground of uncertainty; the contract not specifying what portion of the purchase-money was to be left in the business, but only a "large portion," and not stating when it was to be paid, or how to be secured, and what interest was to be allowed in the meanwhile.

The Defendant principally managed the business, but in 1856, he had expressed himself disposed to sell his share in the partnership business and retire. Some interviews took place, but no definitive arrangement was come to; however, by mutual arrangement, it was determined that some steps should be adopted for the purpose of either closing the concern or vesting it all in one person.

While things were in this position between the partners, the Plaintiff *Samuel T. Cooper* (acting for his brother as well as himself) received from the Defendant the following letter:—

"*Leeds* Iron Works, *Monday*, 18th *May*.

"Dear *Sam*,—In looking over the *papers*, I find, that, in all probability, my accounts on 30th of *June* will be about 140,000*l*., to this add *for goodwill, &c.*, 55,000*l*. to 60,000*l*. This is indeed a large sum, and apparently could, at once, be reduced upwards of 80,000*l*., without reference to *Arthur's* share of stock or securities. It is therefore quite clear, that, under any circumstances,

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cumstances, *a large portion of my money must remain at the works*, for it is in vain to expect any eligible person possessing this fortune to embark in business or yet to have it at command. The more I look at this matter, the more I am convinced of the fairness of my views, for it is obvious that, *for some years*, I must run the risk of the prosperity of the *Leeds* Iron Works, before my share of capital (60,000*l.*) can be repaid, and then after this, the goodwill, &c. The value of this goodwill, and indeed the purchase altogether, is rendered more favorable to the purchaser by the *loan of capital*, on such favorable terms as the *security of the property* itself, and further, that the whole bonus or goodwill will, in all probability, be made and clear itself, in less *time than will be fixed for its payment*. Were I younger, and in your circumstances, I should not for one moment hesitate to purchase these works, on similar terms, and though my wish is, if my way be clear, to retire from the concern, I do so from no fear of its want of continuance, but simply that I have no need of further personal attention to business. I am also of opinion, that no manufacturing or commercial establishment can prosper, if trading with an insufficient capital, and I should, on no account, give my consent to any alteration, in this respect, while my property is at stake in the works. I have therefore carefully looked into this matter, and believe that 80,000*l.* *to* 90,000*l.* *is requisite as a fixed capital*, without the liability of any partner's power to withdraw until the end of the partnership term. Now I have no doubt that you will believe me, when I say, that I should not advise you to do, what I would not do myself under similar circumstances, and moreover, I should be very sorry to carry out an arrangement with any person with whom you could not work well, and be in peace and unity during the partnership. These remarks contain my opinion, and will, I think, lead you to

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to a train of reasoning, which will, I hope, enable you to make a good and sound conclusion, and enable an arrangement speedily to be concluded. As to the fairness of my views, I entertain no doubt, and to show you this, I will make the additional offer of purchasing your family's one-third or your own one-sixth, as can be arranged, on exactly the terms I propose to sell to you. *You must understand, that I make this as a positive offer either to sell or to purchase, as you may elect.* The only other observation that I shall make is, to assure you, that if I purchase your share, I do so only with the view of taking other steps for the immediate sale of the entire property, a matter I feel certain I shall have no difficulty in accomplishing, and without in the slightest disparaging your judgment as a man of business, or your conduct as a gentleman, for believe me, since you first came under my hands on leaving school, I have ever felt you would do both yourself and the business credit. Believe me, dear *Sam*, yours sincerely,

"*Henry Hood.*"

The Plaintiff *Samuel T. Cooper*, having received the authority of his brother, the other Plaintiff, for that purpose, wrote and sent to the Defendant a letter as follows:—

"*Leeds* Iron Works, 28th *May*, 1857.

"My dear Sir,—Since receiving your letter of the 18th instant, I have carefully considered the matter of purchasing your shares in *Leeds* Iron Works, on the terms you ask, and have also taken the advice of friends and my solicitor on the subject. Though sorry as I shall be to leave them after having passed so much of my time here, I cannot but come to this conclusion:—that it will be better to dispose of my sixth share, and also the interest of my brother to you, on precisely the same

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same terms as you proposed to sell to me, and I have communicated with my brother, who fully concurs with me in *accepting your offer*, for our one-third share in *Leeds* Iron Works. According to the statements we made and the calculation we went into, on which terms your letter of the 18th instant is based, our account will be, on 30th *June* next, say about 75,000*l.*, to this add bonus or goodwill from 27,500*l.* to 30,000*l.* These are my views on the subject, and the conclusion I have arrived at after mature consideration."

On the 6th of *June*, 1857, the Defendant wrote a long explanatory letter to the Plaintiff, in which he said,—

"Under these circumstances, I can only call upon you to withdraw your letter of the 29th of *May*, which I look upon as very sharp practice, in at once, without negociation, explanation or one word of conversation, you turn the tables, and try to force me to be a purchaser from you, at the time you were and had been for a long period of time negociating with me to sell to you."

The Plaintiff, in reply, said, amongst other things,—

"I cannot therefore comply with your request, and have no intention to withdraw my letter of the 29th ultimo, but I need hardly state, that I shall be happy to afford you my best services and any assistance in my power in managing and conducting the business for you until you make your new arrangements.

"I fear you have overlooked the paragraph in your letter of the 18th *May*, wherein you state, 'I make this as a positive offer either to sell or purchase as you may elect,' when you speak about sharp practice and turning the tables and trying to force you to be the purchaser."

The

The Plaintiffs instituted this suit against *Hood*, praying a declaration that the letters of the 18th of *May*, 1857, and the 28th of *May*, 1857, constituted a good and valid agreement for the purchase by the Defendant of the Plaintiffs' shares in the partnership business, and that the Defendant might be decreed specifically to perform the same accordingly.

That all necessary accounts might be taken for ascertaining the amounts, which, under the terms of the agreement, were payable to the Plaintiffs.

Or in the alternative, that the partnership between the Plaintiffs and the Defendant might be dissolved, and the affairs of the partnership wound up.

The real question was, whether the first two letters formed a binding contract, which this Court would enforce.

Mr. *R. Palmer* and Mr. *Wickens* for the Plaintiffs.

The Solicitor-General (Sir *Hugh M'C. Cairns*) and Mr. *Rasch* for the Defendant:—*Kennedy* v. *Lee* (*a*); *Honeyman* v. *Marryat* (*b*); *Brace* v. *Wehnert* (*c*); *Price* v. *Griffith* (*d*).

Mr. *R. Palmer*, in reply, cited *Ridgway* v. *Wharton* (*e*); *Goblet* v. *Beechey* (*f*); *Kell* v. *Charmer* (*g*); *Fowle* v. *Freeman* (*h*).

The

(*a*) 3 *Mer.* 441.
(*b*) 21 *Beav.* 14.
(*c*) 25 *Beav.* 348.
(*d*) 1 *De Gex, M. & G.* 80.
(*e*) 6 *H. of L. Ca.* 238.
(*f*) 3 *Sim.* 24.
(*g*) 23 *Beav.* 195.
(*h*) 9 *Ves.* 351.

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Dec. 3.

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The question in this cause is, whether the terms of the Defendant's letter of the 18th of *May*, 1857, are sufficiently distinct for this Court to found upon the acceptance by the Plaintiff of the offer contained in it a decree for specific performance. The way in which I have looked at this case is the following:—If I made a decree for specific performance in the usual terms, after making the declaration that the contract ought to be specifically performed (as there is in this case no question about the title), the decree would contain a reference to Chambers to settle the conveyance in case the parties differed. When I came to settle the conveyance to the Defendant of the interest of the Plaintiff in these works, I should have no other guide than this letter of the 18th of *May*, 1857. The two-thirds are to be bought on exactly the same terms as the Defendant proposes to sell, that is, *mutatis mutandis*, and altering the figures and sums in the proportion of one-third to two-thirds, or, in other words, one-half. With this guide, and no other, I go through and consider the terms of this letter, and consider how far it is clear, and to what extent I could ascertain the manner of carrying it into effect.

If, by a fair inference from the whole letter, taken together, I can do this, then I must make a decree for the specific performance of the contract; but I am not at liberty to supply, by conjecture, anything not to be found in the letter or not to be derived by fair inference from it.

The first uncertainty suggested was with reference to the word "papers," upon which I think nothing turns, because I think the papers are not incorporated into

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nto the agreement, and I cannot refer to them for the purpose of making it clear.

The next uncertainty suggested is, the use of the symbol "*&c.;*" but I do not feel the force of this. The words are "goodwill, &c." Now, these words are connected together, and unite such other things as are necessarily connected with and belong to the goodwill, many of which are easily pointed out; for instance, the use of trade marks, and a covenant by the vendor not to carry on a similar business in *Great Britain*, for a reasonable time to be limited in the conveyance, having regard to the nature of such undertakings. All these would be included in the words *et cætera*, and would be included in the conveyance, and I think with respect to that, I should not have much difficulty in carrying it into effect.

The next difficulty suggested is, that some portion of the purchase-money is to be left in the business, and for "some years." Now, this is a much more serious objection. What portion of the purchase-money is meant by a "large portion," which are the words used in the letter? How is it to be paid; by what instalments, and after what time; and how is the unpaid portion to be secured? I look in vain for anything in this letter to guide me in this respect. It is clear that the purchase-money is not to be paid down, for in this passage the Defendant expressly states, "that under any circumstances, a large portion of my money must remain at the works," and afterwards, "that for some years I must run the risk of the prosperity of the *Leeds* Iron Works before my share of capital (60,000*l.*) can be repaid.

The next passage may perhaps be fairly interpreted to mean that the purchase-money was to be held on the "security

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"security of the property;" but is the personal security of the purchaser to be added to this? This is left in doubt, and still more the time to be fixed for the payment of the purchase-money is expressly left to be afterwards fixed, for it says, that the bonus will in all probability clear itself "in less time than *will be fixed* for its payment." How could I fix this time? The time when the payment of the purchase-money is to be required is a matter of very great moment, and this may materially affect the eligibility of the purchase, or indeed the possibility of effecting it.

Another difficulty is this:—assuming, as I think may fairly be done in favor of the Plaintiffs, that interest is to be paid on the unpaid purchase-money until it is paid, at what rate is the Court to fix the interest to be paid? Is it to be at the legal rate of five *per cent. per annum*, or at four per cent., which is the sum usually given by Courts of Equity in those cases where no beneficial employment or fraudulent retention of the money has occurred.

Without going further, I do not see how it is possible for the Court to get over this difficulty. I assume that I can get over the first difficulty as to the price of the goodwill, by fixing two-thirds of it at such a sum, between 55,000*l.* and 60,000*l.*, as, having regard to the business and the profits made in it, and the sale of similar undertakings, would be considered fair, that would be reduced to one-half when only one-third is bought instead of two-thirds. I assume also that I can give a meaning to the "*&c.*" which follows the word "goodwill," according to the suggestion I have already made. But how are these difficulties to be overcome, and how can I myself, without making a contract for the parties, specify what portion of the purchase-money is

is to remain unpaid, for what length of time, on what security, at what rate of interest, and in what manner and by whom is the payment of it to be enforcible?

But this is not the only difficulty. What meaning can the Court give to the words "loan of capital" in this sentence—"The value of the goodwill, and indeed the purchase altogether, is rendered more favorable to the purchaser by the *loan of capital*, on such favorable terms as the security of the property itself?" Does it mean that the portion of the purchase-money which is to be allowed to remain in the business is the *loan of capital?* and is this to be governed by the sentence in a subsequent part of the letter, where the writer says, "that 80,000*l.* or 90,000*l.* is requisite as a fixed capital" in order to obviate the dangers pointed out in the previous sentence, consequent upon trading with insufficient capital?

What construction do the Plaintiffs put upon this, and what is it that they contend for? Is it that the money is to be paid down, or is it to be paid by instalments for a considerable number of years, and in the meantime secured on the property? As I understand their argument, they contend, that the whole of the purchase-money is to be paid at once; but I cannot assent to this proposition. Suppose the Plaintiffs had written to the Defendant accepting his proposal, and had stated to him, that they understood the terms of his letter to mean what they now contend for, would it not clearly have been a case in which the Defendant would have been at liberty to say such was not the meaning of his letter, that he considered that all those matters were left to be settled hereafter, and that he had not agreed to bind himself to anything definite on this point?

After

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After turning the matter over and over again in my mind, the more I consider it, the more impossible I find it to arrive at any definite conclusion; and on the whole I think that the fair meaning of the letter (which I have read all through because all the terms of the letter and the tone in which it is written tend to the same end) is to regard it as a proposal to buy or sell, on terms to be arranged, for which the observations and the statements in the letter are to form the basis, and are to guide the parties in their consideration of the exact terms of the arrangements which are to be made on the proposal offered.

I am strongly confirmed in this view by the following sentence, which concludes the passage that I referred to:—"These remarks contain my opinion, and will, I think, lead you to a train of reasoning, which will enable you to make a good and sound conclusion, and enable an arrangement speedily to be concluded."

I cannot, therefore, in my opinion, treat this as a serious offer to buy, on certain fixed and definite terms to be found in this letter. I think it amounts to treaty, but that it does not go beyond, and I think therefore that I am unable specifically to perform the contract as prayed by the bill, and the bill must therefore be dismissed, so far as it prays a specific performance of the contract. But a decree must be made in the other branch of the alternative of the prayer, for taking the partnership accounts and for realizing the partnership property. Probably it would be desirable to follow the terms of the decree in *Cooke* v. *Collingridge*.

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Dec. 13, 22.

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Jan. 11.

GASKELL *v.* CHAMBERS. (No. 2.)

A solicitor and his client were both Defendants. The solicitor admitted documents in his possession belonging to his client, but claimed privilege; the client made no admission as to possession of these documents. Upon an application in the presence of both, the Court made an order for production.

THIS bill was filed by the Plaintiff on behalf of the shareholders of a company against the directors, the solicitors and other officers of the company, and against the company, to recover 8,000*l.* The business had practically ceased to exist by merger with another company.

The directors, by their answer, admitted that certain papers were in possession of the Defendant Mr. *Shepheard*, as one of the solicitors of the company. Mr. *Yetts*, another solicitor of the company, by his answer, admitted he had in his possession certain other documents as solicitor of the directors, which he said were privileged. These documents were not mentioned in the directors' answer.

A summons was taken out by the Plaintiff against the directors and *Yetts*, for the production of all the documents.

The Master *of the* Rolls directed the company to be served with notice of this application. This was done, but the company did not appear.

Mr. *R. Palmer* and Mr. *Beavan*, now moved for production.

Although the directors do not admit the possession of those papers, which are in the possession of Mr. *Yetts*, still either the directors or Mr. *Yetts* are bound to produce

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duce them. The case is like *Blenkinsopp* v. *Blenkinsopp* (*a*): there, the principal Defendant denied that his co-Defendants, *Fenwick* and *Trotter*, had acted as his solicitors; while they insisted on withholding the produce of certain letters in their possession, as being privileged communications between solicitor and client. Lord *Cottenham* says:—"The Master of the Rolls cannot have meant to say (*b*), that if one Defendant says, 'I have documents in my possession, but they belong to a co-Defendant,' and that co-Defendant either puts in no answer, or says that he has nothing to do with them, the Court is to be baffled with that course of proceeding between two Defendants." In that case, Mr. *Blenkinsopp* put in a further answer, qualifying the statements in his former one, and claiming the benefit of the privilege, but the Lord Chancellor being of opinion, upon the two answers taken together, that he had not established such a connection between himself and the other Defendants, in relation to the documents, as to entitle them to protection, made an order for their production, and discharged the order of the Master of the Rolls.

Here, upon the two answers taken together, the Plaintiffs are entitled to a production.

In the *Cameron's Coalbrook*, &c. Railway Company case (*c*), a solicitor, in the presence of his client, objected to produce a document, on the ground of professional confidence. The Court, being of opinion that the document was not privileged as regarded the client himself, ordered its production.

Mr. *Selwyn*, for the directors, did not object to the production,

(*a*) 2 *Phill.* 607.
(*b*) 10 *Beav.* 281.
(*c*) 25 *Beav.* 1.

production, but asked for the costs of the adjournment of the summons into Court, on the grounds, which it is not necessary to state. He cited *Murray* v. *Walter* (*a*).

Mr. *Lloyd*, for the Defendant *Yetts*, argued that no production could be ordered against a solicitor, for such an order could only proceed upon an admission contained in the answer of the client, and not of the solicitor who held for him, and that *Yetts* had been improperly brought before the Court on this motion.

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The situation of *Yetts* is this:—He has mixed himself up with these matters, I express no opinion as to the relief which may be had against him, but it may be assumed that some case is made against him by the bill, for he has not demurred to it.

So far as the owners of these papers are concerned they do not refuse to produce them. The Plaintiff produces an affidavit of service on the company, who do not object, for they do not appear. The directors appear and do not object, and *Yetts* has no interest in the papers, except a lien for his costs.

Mr. *Lloyd*. He does not claim any.

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Then he is bound to produce them.

As to the directors being served, *Yetts* says he holds the

(*a*) *Cr. & Phill.* 114.

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the papers as their solicitor, and if they had not been present, he might have objected, that no order could be made in their absence. They were therefore necessary parties to the application.

There must be the usual order for production.

Dec. 11, 13, 16.

COLLINS *v.* COLLINS.

Parties entered into a contract to purchase a brewery and plant at a price to be fixed by arbitrators, who were to choose an umpire before entering upon the valuation. The arbitrators could not agree on an umpire:— *Held*, that the Court had no authority, under the 17 & 18 *Vict.* c. 125, *ss.* 1, 2, to appoint an umpire for such a purpose.

BY the decree, a brewery and plant at *Richmond*, part of the assets of the testator, were ordered to be sold.

The executrix entered into a written contract with Messrs. *Phillips* and *Wigan* for the sale to them of the brewery and plant at a valuation.

And it was thereby agreed, "that the purchase-money of all the premises agreed to be sold should be determined by Mr. *Mason* for the vendor, and by Mr. *Moss* for the purchaser," and "that they should choose an umpire before entering upon the valuation." Provision was made for the event of the death of an arbitrator, or of an arbitrator failing to proceed with the valuation. And it was agreed, "that the duties of the umpire should be strictly confined to the matters in difference between the *valuers*."

The contract was sanctioned by the Court, but the valuers "were unable to agree upon or concur in the nomination or appointment of an umpire." Thereupon a summons was taken out, under the 17 & 18 *Vict.* c. 125, s. 12, for the appointment of an arbitrator by the judge.

By

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By the 12th section of the Common Law Procedure Act (17 & 18 *Vict.* c. 125, s. 12), it is enacted as follows:—"If in any case of arbitration the documents authorizing the reference provide that the reference shall be to a single arbitrator," &c., &c., &c., "or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator, or if," &c., &c., &c., "then, in every such instance, any party may serve the remaining parties or the arbitrators, as the case may be, with written notice to appoint an arbitrator, umpire or third arbitrator respectively, and if, within seven clear days after such notice shall have been served, no arbitrator, umpire or third arbitrator be appointed, it shall be lawful for any judge of any of the superior courts of law or equity at *Westminster*, upon summons to be taken out by the party having served such notice aforesaid, to appoint an arbitrator, umpire or third arbitrator, as the case may be, and such arbitrator, umpire and third arbitrator respectively shall have the like power to act in the reference, and make an award, as if he had been appointed by consent of all parties."

Mr. *Lloyd* and Mr. *Baggallay*, for the Defendant, the executrix. This Court has authority, under the act which applies to "any case," to appoint an umpire. It was done by Vice-Chancellor *Wood*, even in an arbitration commenced before the passing of the act (17 & 18 *Vict.* c. 125); *In re Lord* (*a*). They also referred to *Elvin* v. *Drummond* (*b*).

Mr. *Selwyn* and Mr. *Mackeson* for the Plaintiff. This case comes precisely within the words of the statute;

(*a*) 1 *Kay & J.* 90. (*b*) 4 *Bing.* 415.

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statute; "two arbitrators are at liberty to appoint an umpire or third arbitrator;" they have not done so after notice, and the statute expressly says that "it shall be lawful for any judge," &c. "to appoint an umpire or third arbitrator." This is clearly a case of arbitration. There is a complete agreement, which is connected with the suit and the proceedings in Court, by the clause requiring the approval of the judge.

It will be said, that this is not an *arbitration* but a *valuation*, but in similar cases persons are, by the legislature and the judges, called arbitrators, whose only duty is to make a valuation. Thus, in the Lands Clauses Act, the Companies Clauses Act, and by Vice-Chancellor *Kindersley*, who, in *Darbey* v. *Whitaker* (*a*), calls a valuation by two licensed gaugers an "arbitration." So an agreement that the amount of compensation for lands taken by a railway was treated as an arbitration by the Court in *Morgan* v. *Milman* (*b*). The act is a remedial act, and must be held "to apply to all cases;" *In re Lord* (*c*). *Leeds* v. *Burrows* (*d*) and *Perkins* v. *Potts* (*e*) were cases of mere appraisement, and not of arbitration. They also referred to 9 & 10 *Will.* 3, *c.* 15; 3 & 4 *Will.* 4, *c.* 42, *ss.* 39, 40, 41; *Gourlay* v. *The Duke of Somerset* (*f*); *Tilsey on the Stamp Act* (*g*); *Mills* v. *The Bowyers' Company* (*h*); *Re Aitken's Arbitration* (*i*); *Brown* v. *Tanner* (*k*); and see *Jebb* v. *M'Kiernan* (*l*), and *Elvin* v. *Drummond* (*m*).

Mr. *Schomberg* and Mr. *W. J. Bovill* for the arbitrators.

Mr.

(*a*) 3 *Drew.* 140.
(*b*) 3 *De Gex, M. & G.* 24.
(*c*) 1 *Kay & J.* 94.
(*d*) 12 *East*, 1.
(*e*) 2 *Chitty's Rep.* 399.
(*f*) 19 *Ves.* 429.
(*g*) *Page* 66.
(*h*) 3 *Kay & J.* 66.
(*i*) 3 *Jurist* (*N. S.*), 1296.
(*k*) 1 *M'Clel. & Y.* 464; 1 *Car. & P.* 651.
(*l*) *Moody & M.* 340.
(*m*) 1 *Moor. & P.* 88.

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Mr. *R. Palmer*, Mr. *Unthank*, and Mr. *Druce*, for Messrs. *Phillips* and *Wigan*. This is not an arbitration at all, the question of price is an unsettled term of a voluntary incomplete contract, and this is an attempt to supply it. Until the price has been fixed the contract is imperfect. A mere valuation in no way comes within the legal definition of an "arbitration," which assumes a matter of controversy, and there can be none where there is no complete binding contract. The definition is thus given in the *Termes de la Ley* (*a*):—"Arbitrement is an award, determination or judgment, which one or more maketh at the request of two parties at the least for and upon some debt, trespasse or other controversie had between the said parties. And this is called in Latin *arbitratus* and *arbitrium*, and they that make the award and arbitrement are called *arbitri*, in English arbitrators. To every arbitrement five things are incident, *scil.*, matter of controversie, submission, parties to the submission, arbitrators and giving of the arbitrement;" *Dyer* (*b*).

The decisions as to the stamps on appraisements and awards show the distinction, and that the mere fixing the value of a thing is not an arbitration.

The second act only applies to such arbitrations as may be had under the first statute of the 9 & 10 *Will.* 3, c. 15.

They also referred to *Gordon* v. *Whitehouse* (*c*); *Milnes* v. *Gery* (*d*); *Parkes* v. *Smith* (*e*), and *In re Lee and Hemingway* (*f*).

Mr.

(*a*) *Page* 28.
(*b*) *Page* 217, *pl.* 60.
(*c*) 18 *Com. B. Rep.* 747.
(*d*) 14 *Ves.* 400.
(*e*) 15 *Q. B. Rep.* 305.
(*f*) 3 *Nev. & M.* 760.

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Mr. *Lloyd* in reply. The price is in difference and controversy, and may properly be made the subject of arbitration.

The MASTER *of the* ROLLS.

Dec. 13. When this case was brought before me I was a good deal startled at the apparent consequences which would result from the effect of the Act of Parliament, if the vendor be right in his contention as to its construction. Undoubtedly the consequence would be, that in all those cases in which the Court of Chancery has hitherto held, that the contract cannot be enforced in this Court, the objection hitherto relied upon would, by a very simple process under this Act of Parliament, be removed, and the jurisdiction of this Court would immediately apply, and specific performance would be enforced. Thus, for instance, if one person agreed to sell a property of a particular description to another, and said the price should be fixed by *A. B.*, who had a particular knowledge of that species of property, and that in consequence of that knowledge he would entrust the valuation of that property to him, and to him alone, and if that person should happen to die before he was enabled to make the valuation under this Act of Parliament, the purchaser might call upon the Court to appoint another person to make the valuation. He having accordingly made the valuation, it would bind both parties, and be carried into effect, in the same way as if the valuation had been made by the person originally named, although it was very far from being the intention of the vendor, who expressly stated, that he only entered into a contract in that peculiar form, because he knew that the particular person to whom it was proposed to refer the question of price had a peculiar knowledge of the value of the property, and the

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the manner in which it was situated. Nevertheless, if the Act of Parliament has ordered this to be done, this Court must carry it into effect. It only remains, then, to look at what the words of the Act of Parliament are, to see if, by express direction, or by necessary implication, there be involved in them such a conclusion.

In looking at the Act of Parliament, I observe the words used, which govern the whole sentence, are, "if, in any case of arbitration." It is not necessary to go farther, because all depends upon these words. What do they mean? What is a "case of arbitration?" In one view of the case it is important to look at what is the construction that has been placed upon the statute of the 9 & 10 *William* 3, and to observe in what manner the Courts have dealt with the word "arbitration" under that statute, in order to consider what is the proper meaning that should be given to it here. And I must say, I find few reasons that would apply to exclude any particular arbitration, or any form of reference which may be called an arbitration, from the statute of *William*, which do not equally apply and exclude it from the statute of the Queen.

The Plaintiff submits, that the word does not mean the arbitration specified in the Act of Parliament, but that the word is general and applies to anything, whether within or without the Act of Parliament itself, which can properly be called "arbitration."

It become necessary, therefore, to consider what an arbitration is. Now I fully concur in the observation, that fixing the price of a property may be "arbitration." But I do not think, that in this particular case, the fixing of the price of the property is an arbitration, in the

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the proper sense of the term. An arbitration is a reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties. It is very true that in one sense it must be implied that although there is no existing difference, still that a difference may arise between the parties; yet I think the distinction between an existing difference and one which may arise is a material one, and one which has been properly relied upon in the case. If nothing has been said respecting the price by the vendor and purchaser between themselves, it can hardly be said that there is any difference between them. It might be, that if the purchaser knew the price required by the seller, there would be no difference, and that he would be willing to give it. It may well be, that if the vendor knew the price which the purchaser would give, there would be no difference, and that he would accept it. It may well be, that the decision of a particular valuer appointed might fix the price and might be equally satisfactory to both; so that it can hardly be said that there is a difference between them. Undoubtedly, as a general rule, the seller wants to get the highest price for his property, and the purchaser wishes to give the lowest, and in that sense it may be said that an expected difference between the parties is to be implied in every case, but unless a difference has actually arisen, it does not appear to me to be an "arbitration." Undoubtedly, if two persons enter into an arrangement for the sale of any particular property, and try to settle the terms, but cannot agree, and after dispute and discussion respecting the price, they say, "we will refer this question of price to *A. B.*, he shall settle it," and thereupon they agree that the matter shall be referred to his arbitration, that would appear to be an "arbitration," in the proper sense of the term,

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and within the meaning of the act; but if they agree to a price to be fixed by another, that does not appear to me to be an arbitration.

It appears to me that the case of *Leeds* v. *Burrows* (*a*) draws the proper and fit distinction between an *arbitration*, in the proper sense of the term, and an appraisement or valuation, for valuation undoubtedly precludes differences, in the proper sense of the term; it prevents differences, and does not settle any which have arisen. That is the distinction which, in my opinion, exists between those cases of appraisement and those cases of arbitration. The distinction seems to be drawn in the case of *Hemingway's Case*, cited in a note to the case of *Parkes* v. *Smith* (*b*). There, there was an agreement to sell land at a particular price to be fixed by award, the price was fixed, and they came for an attachment under the award, and said it was an arbitration; but Mr. Justice *Littledale* very clearly pointed out the distinction; he says, "this is not properly an arbitration, it is in effect an agreement to sell the land, and this is not a settlement of any difference between them, but merely something auxiliary to the contract entered into between them, for the purpose of the sale of the land. And accordingly, upon a breach of the contract, you have your remedy, for it is clear, that a specific performance would have lain here in that case. It is clear also, that an action would have lain for damages, but not being an award, because it was not a matter in difference that was referred by these parties, you cannot have it by way of attachment."

Therein lies the distinction, and which is approved of by

(*a*) 12 *East*, 1. (*b*) 15 *Q. B.* 305.

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by Lord *Campbell*, who thought it proper, and one which he must adopt.

The other case which has been referred to, of *Gordon* v. *Whitehouse* (*a*), does not appear to affect the case materially one way or the other. The cases which are material are *Hemingway's Case* and *Leeds and Burrows* (*b*).

I look at this simply as in the nature of a contract, and that this arrangement respecting the price was auxiliary to it; and that in order to save discussion and to prevent differences which might arise between the parties, it was agreed that the price should be fixed by two persons, who were to call in an umpire before they proceeded to the settlement. Accordingly, in *Darbey* v. *Whitaker* (*c*), it never occurred to the parties, that the Court had power to appoint an arbitrator which would have removed all the difficulty and arrested a series of decisions, of which *Milnes* v. *Gery* (*d*) is an instance. If the Act of Parliament had intended to refer to and alter the law of these cases, one should have expected it would have gone further, (for you must attribute to the legislature a perfect knowledge of the law,) and, in that case, it should have gone on to say, and "be it further enacted, that in any case of a suit for specific performance it shall not be any sufficient defence to such suit to allege that the arbitrator has died, or that no arbitrator was appointed, and the Court shall have power to appoint an arbitrator in such case for the purpose of completing the contract." Whether the legislature foresaw what the consequence would be of the general words used, it is impossible for me

(*a*) 18 *C. B. Rep.* 747.
(*b*) 12 *East*, 1.
(*c*) 4 *Drew.* 134.
(*d*) 14 *Ves.* 400.

me to ascertain; but I think that by restricting the word "arbitration" to the proper sense of the term, the section is perfectly right, and does not apply to a case of this description.

I have had an opportunity of speaking to the Vice-Chancellor Sir *William Page Wood* since the hearing of this case, and I have his authority for saying, that he did not intend *Re Lord* in this section of the Act to apply to a case of this description. Concurring with him in that decision and in the opinion which he gave as to the remedial nature of the statute, still I am of opinion that it does not govern, and was not intended to govern, this case; but the cases which do govern it are those of *Leeds and Burrow* and *Hemingway's Case.*

Accordingly I must hold, that in this case the Court has no authority, under the statute, to appoint any umpire. I think it a case of considerable importance and a very proper one to be argued, and I shall therefore give no direction as to costs.

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May 26, 27, 28.

Nov. 3.

BOLDERO *v.* THE EAST INDIA COMPANY.

A fund was created for providing retiring pensions of 1,000*l.* a-year for civil servants of the *East India* Company in *Bengal*, after twenty-five years' service. The fund was derived from a deduction of 4*l.* per cent. on the salaries, with an equal amount contributed by the *East India* Company. A scale of the values of the annuities, according to the ages of the annuitants, was fixed, and upon a member's retiring with an annuity, if the amount paid by him, together with its accumulations, were less than one-half of the tabular value of his annuity, he was bound to make up the deficiency. The contrary happened to the Plaintiff, who had paid 4,469*l* more than the half value:—*Held*, that he was not entitled to have the excess refunded.

When the terms of a contract are plain, usage can little affect the construction to be placed upon it; but when it is ambiguous, the usage for a long time may influence the judgment of the Court, by showing how it was understood by the original parties to it.

THE object of the present bill was to compel the repayment of the accumulated amount of subscriptions paid to the Defendants by the Plaintiff as a subscriber to the "*Bengal Civil Service Annuity Fund*," in excess of half the value of the annuity payable to the Plaintiff out of that fund. The question arose under these circumstances:—

On the 1st day of *May*, 1822, the civil servants of the *East India* Company, at the presidency of *Bengal*, addressed a memorial to the court of directors, praying for the establishment of a fund in *Bengal*, for granting annuities to civil servants on their retirement from the service. The memorial was accompanied by certain suggested regulations for the management of the proposed fund, and which were submitted to the court of directors for their approval. The civil servants proposed to contribute four per cent. on the official income, and they solicited a contribution from the company proportionate to what was allowed to the *Madras* fund.

The court of directors of the *East India* Company, on the 8th of *December*, 1824, addressed a despatch to the government of *Bengal*, suggesting alterations and modifications in the plans and regulations proposed. The

The despatch, and the regulations and proposed alterations were transmitted to the committee of the civil service by the government of *Bengal*, accompanied by a letter written by the secretary of the government, and dated the 12th *May*, 1825. The regulations, as altered by the court of directors, were, in all material respects, adopted by the civil servants, at a general meeting held on the 12th of *November*, 1825, and were finally sanctioned by the court of directors, by a despatch dated the 30th *May*, 1827.

The substance of the arrangement was as follows:— A fund was provided, out of which nine life annuities of 10,000 rupees were annually provided, upon their retirement, for nine civil servants who had been twenty-five years in the service and had resided in *India* not less than twenty-two years.

The fund was provided by a deduction of four per cent. on the official incomes of the subscribers and by an equal sum contributed every year by the *East India* Company, the whole being accumulated by them at six per cent.

A scale of the value of an annuity, according to the ages of the annuitants, was fixed. The following example will explain it:—

	Rupees.
If of the age of 40 years	137,050
„ „ 45 „	101,100
„ „ 50 „	94,170
&c., &c., &c.	

By one of the regulations, a subscriber, to entitle him to an annuity, was required to pay to the institution the difference between one-half of the tabular value

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value of the annuity on his life and the accumulated value of his previous contributions, in case the latter quantity should be less than the former.

The annuity fund being thus formed in *Bengal*, upon the principles explained in the despatch of the court of directors of the 8th *December*, 1824, the Plaintiff and many other civil servants of the company became subscribers, and the *East India* Company deducted out of their salaries four per cent. upon such salaries and emoluments, and the company provided an equal sum.

The Plaintiff retired from the service in *November*, 1852. He was then of the age of sixty-one years, he had been twenty-five years in the service, and had resided twenty-two years in *India*, and he was qualified, according to the regulations of the fund, to receive an annuity of 10,000 rupees on payment of one-half the value thereof, according to the table of values annexed to the regulations, and an annuity was tendered to and accepted by him.

According to the table annexed, the value of an annuity of 10,000 rupees for the life of the Plaintiff was 76,170 rupees, and one moiety of such value amounted to 38,085 rupees. At the same time, the sum standing to the credit of the Plaintiff's separate account (being the accumulated value of his contributions, with interest) was 87,504 rupees, which exceeded the half value of the Plaintiff's annuity (calculated according to the table) by the sum of 49,419 rupees, and exceeded the total amount chargeable against the Plaintiff, under the regulations of the fund, as the price of his annuity, by the sum of 44,693 rupees.

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The Plaintiff applied for a refund of the excess of the accumulated amount of his subscriptions and interest. This being refused, he filed this bill, which prayed, first, a declaration that, according to the true construction of the regulations of the *Bengal* Civil Service Annuity Fund, and according to the principles explained in the despatch of the court of directors of the *East India* Company of the 8th of *December*, 1824, the Plaintiff and the other subscribers to the fund were entitled to a refund of any excess of the accumulated value of their contributions and interest above the aggregate amount of the half value of their respective annuities, according to the table annexed to the regulations of the fund.

2. That the *East India* Company, and, if necessary, the managers of the fund, might be decreed, out of the final and disposable balance of 10,86,257 rupees (*a*), now in the hands of the *East India* Company, or otherwise out of the general funds of the said institution, to pay to the Plaintiff the sum of 44,693 rupees (*b*), being the excess of the accumulated value of his contributions above the sums chargeable against him in respect of his annuity, with interest.

3. That the Defendants might be restrained from capitalising or converting to their own use the sum of 26,26,357 rupees (*a*) or any part thereof, and from applying the same otherwise than to the purposes of the said fund.

It was stated by the bill, that in *Bombay* and *Madras* the practice of refunding had uniformly prevailed.

The

(*a*) The alleged aggregate excess.

(*b*) The unappropriated balance standing to the credit of the fund.

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The cause now came on for hearing.

Mr. *Butt*, Mr. *Rolt*, Mr. *R. Palmer* and Mr. *Freeling*, for the Plaintiff.

Sir *R. Bethell*, Mr. *Lloyd* and Mr. *Melville*, for the *East India* Company.

Mr. *Follett* and Mr. *Rogers* for the managers of the fund.

Mr. *Macnaghten* for two subscribers, who had not paid one half, and had not accepted annuities.

Mr. *R. Palmer* in reply.

The MASTER *of the* ROLLS.

Nov. 3. This suit is instituted by one of the retired servants of the civil service of the *East India* Company in *Bengal*, asking this Court to put a construction on certain written documents, some of which contain the regulations of the *Bengal* Civil Service Annuity Fund, and others of which are explanatory thereof.

The documents adduced by the Plaintiff, in support of his claim, are of three different classes, which vary in degrees of value and importance. The first class consists of documents which bear date in and prior to the year 1825, and by which the annuities of retiring civil servants in *Bengal* were established and regulated. The documents of the second class bear date in the year 1835, and relate to the temporary substitution of a new and experimental plan, for the purchase of annuities for retiring civil servants at a quarter of their value, instead of one-half, in consequence of the partial

failure

failure of the original scheme. The documents of the third class bear date in the years 1838 and 1841, and relate to the substitution of a new plan for the acquisition of the annuities by retiring civil servants, and to the various modifications in the scheme of the institution, which were proposed, and which were accepted or rejected. The two latter classes of documents, as will appear plainly in the course of the observations I have to make, bear little upon the real question before me. They relate rather to the history of the institution, after the experience of some years had shewn its working and tested its efficiency.

The question really depends on the documents which bear date in and prior to the year 1825, by which the fund for compensating the retiring civil servants was created, and the institution established. The documents of this period are also of very unequal value. They are four in number. The first bears date the 1st *May*, 1822, and is a proposal, in writing, made to the *East India* Company by their civil servants in the Presidency of *Bengal*. It suggests the propriety of raising a fund, for the purpose of providing annuities for retiring civil servants, and points out the means by which this might be done, which is, partly by subscription amongst themselves, and partly by a contribution to be made by the company itself. It further suggests, that the *East India* Company should act as treasurers of the fund, and that in that character the company should make and pay interest on the funds subscribed, and to be retained by them. The second document of this series bears date the 29th of *June*, 1822. It is a dispatch from the Governor-General to the *East India* Company, recommending the adoption of this proposal. The third document is the answer of the directors of the *East India* Company, which bears

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date the 8th *December*, 1824. The fourth document is a letter written by the Secretary of the Government of *Bengal* to the members of the Committee of the Civil Service, transmitting and accompanying the answer of the directors. This last document bears date the 12th *May*, 1825.

The document of paramount importance in this series is the third, viz. the answer of the directors of the 8th *December*, 1824. It is an assent to the principle of the proposal made by the civil servants, but it adopts that principle on more liberal terms than had been suggested by them. The question really depends on the construction of this document; the others are of little moment, and indeed might be disregarded, except for the purpose of explaining how the system originated, and in that view, might possibly be referred to when the history of the origin of the institution could assist in explaining any word or sentence of ambiguous import, did any such occur in this dispatch of the 8th *December*, 1824. This also has been the view adopted by the counsel for the various parties to the cause, and, accordingly, all the principal arguments have been directed to the consideration of the meaning of this document, and the true construction to be placed upon it with reference to the claim of the Plaintiff.

This document is called "The Public Letter to *Bengal* of 8th *December*, 1824;" it consists itself of two parts, which also are of unequal value. The former part consists of seventy-eight paragraphs, of which the last forty-six paragraphs contain a long and elaborate discussion, in detail, of the plan suggested by the civil servants, and of the alterations and modifications of it, which the directors propose to introduce; and the latter part

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part contains, in parallel columns on one side, the regulations proposed by the committee of the *Bengal* civil servants, and, on the opposite side, the alterations considered necessary by the Court of Directors. Thus it is, that the latter part of this public letter contains the statute in writing, if I may so express myself, by which the Civil Service Retiring Annuity Fund is to be regulated; and the former part of it contains explanations of the scheme so sanctioned, with discussions as to its objects and its probable operation, together with the reasons which have induced the directors to modify the proposals submitted to them, and to establish the institution itself, upon the regulations which I have termed the statute governing the formation and distribution of the fund.

We should, therefore, in the first instance, look at the statute or regulations of the institution, in the latter division of this document, and if they are clear and complete as to the question before the Court, they cannot with propriety be set at nought or contradicted by what may be discovered in the early part of the dispatch, which is explanatory of the reasons for establishing, and discusses the consequences which may be expected to follow from the creation of the institution and the plan thus settled. At the same time, it would be very unfit to look at this part of the letter alone; it may well be, that a careful examination of both parts of this document, taken together, may shew that some regulations originally intended have been omitted, that the manner in which some of the regulations are worded is imperfect and incomplete, that an uncertainty or ambiguity exists in others, which is only to be discovered by a knowledge, not only of all the facts connected with the case, but also of the reasons which influenced and the motives which actuated the directors in the establishment

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of this scheme: the reasons and motives are displayed only in the former part of this dispatch, and as they form a part of the document itself, the true construction of it can only be arrived at by careful perusal and examination of the whole taken together. This is the more necessary, in this particular case, because the perusal of the whole of the documents has led me to the conclusion, that the proposed regulations, with the alterations made by the directors and which are appended to it, in parallel columns, seem to have been intended by the directors principally in the light of shewing the mode in which they thought they could best express, in what may be called the form of enactment, the objects which they had fully propounded and explained in the earlier part of their letter. A careful examination, therefore, of both parts of this document, both separately and conjointly, and of what gave rise to it, is necessary to enable the Court to come to a satisfactory conclusion as to the real meaning and true construction to be put on this paper with regard to the question itself.

The general object of the scheme proposed by the civil servants of *Bengal* was the creation of an annuity fund to supply annuities for the retirement of civil servants every year, of such an amount and attainable on such terms as to induce a considerable number of the civil servants to retire in each year, and thus to make way for others. The leading objects then were twofold; first, by this means to secure an annuity to civil servants on their retirement; and secondly, to promote, what is called in these papers, a "*quicker movement*" in the promotion of civil servants. To accomplish these objects, the civil servants of *Bengal* proposed, that as a fund should be formed in the following manner, namely, that the civil servants should subscribe 4*l.* per cent.

cent. per annum on the amount of their official incomes and emoluments in the first place, and as this would not be sufficient to provide a fund sufficiently large for the purpose required, they requested the directors of the *East India* Company to supply a sum proportionate to what they allowed to the *Madras* fund, which was then in operation; that is, to supply an equal amount with the sums subscribed by the civil servants themselves, and by these means, they calculated that a fund would be created which would be sufficient to make up whatever might be required, in order to admit of eight or nine retirements every year upon life annuities of 10,000 rupees each. And they suggested, that the subscriber should become absolutely entitled to the offer of an annuity for his life, for that amount, when he had been a subscriber for twenty-three years, but that he was also to be able to entitle himself to the like annuity, at anytime before that period, provided he paid to the institution the difference between two-thirds of the actual value of the annuity on his life, at the date of his retirement, and the accumulated amount of his previous subscription to the fund. The proposal then contains many regulations for working out this system in detail.

The *East India* Company, by their letter of the 8th *December*, very readily adopted the principle of the proposal of the *Bengal* civil servants, but they did so on a much more liberal scale, and introduced several modifications, which were better calculated to secure the object they both had in view. The object of the directors of the company is expressed thus, in the 33rd paragraph of their public letter:—They state their favorable opinion of the establishment of such a fund, because it was calculated to answer "useful and wise ends, as providing for an unexpected loss of fortune, and

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and as occasioning the return of the company's servants to *Europe* by a *quicker movement* than would otherwise take place, and thus securing to the company the services of Europeans in the most active period of their lives, and making way for the advance of younger servants."

The modifications which the directors introduced, to promote this object, were to the following effect:— They resolved that the annuities should be 10,000 rupees each, at 2*s.* per rupee, that is 1,000*l.* sterling *per annum*, raising the annuity therefore from 700*l.* to 1,000*l.*, and that the period to entitle a person absolutely to the annuity should be twenty-five years' subscription, and twenty-two years' actual residence in *India*, and that before that time the civil servant might entitle himself to receive it by payment of one-half of the value of the annuity, towards the payment of which the amount of his subscriptions was to be allowed on account, and the *East India* Company undertook to contribute whatever money might be required in addition to the contributions of the subscribers, to enable the fund to grant as many as nine annuities annually, on the principle thus stated. Furthermore, in order to diminish the amount to be paid by the retiring civil servant to entitle him to his annuity, the company resolved, by article 64, "that interest at the rate of 6*l.* per cent. per annum should be allowed on the funds set apart for the payment of the annuities" which would have the effect of causing the subscriptions of the civil servants to accumulate at that rate at compound interest. The annuities in each year were to be offered to the civil servants, according to their seniority, or the "gradation list" of the service, as settled by the directors. With respect to existing civil servants, the subscription was to be optional, but with respect to all future

future civil servants in *Bengal*, it was to be compulsory, and an engagement to subscribe to the fund was to become a part of the covenants of all persons thereafter to be appointed writers.

The general effect of this scheme, in the majority of cases, is very plain. Every one of the *Bengal* civil servants was to subscribe four per cent. out of his official income and emoluments; this was to accumulate at compound interest at six per cent. until he retired. Whenever he was desirous to do so, provided the pensions then available were not taken by his senior, he was entitled to a retiring pension of 1,000*l.* per annum for his life, on payment of so much money as, together with the fund created by his subscription of four per cent. accumulated at compound interest of six per cent. would amount to half of the value of such an annuity at the age he had then attained. Thus, supposing a civil servant to have attained the age of forty-five years, and to be then desirous of retiring, the value of the annuity of 10,000 rupees for his life is calculated at 101,100 rupees, according to the table appended to the regulations. The consequence would be, that the price to be charged against him for this annuity would be half or 50,550 rupees; and if his subscriptions of four per cent. out of his official income with the accumulated interest thereupon amounted to 50,000 rupees, he would have to pay 550 rupees additional, to entitle himself to the annuity. If the subscriptions amount to 50,550 rupees he would have to pay nothing. In these cases the regulations are distinct and unambiguous, but if his subscriptions, either with or without the accumulated interest, exceed the 50,550 rupees, then arises the question raised by the bill. In that event, is the civil servant entitled to a refund of his subscriptions, over and above the 50,550 rupees that is

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over and above the sum which was required to be paid or made good by him, for the purpose of purchasing his life annuity of 1,000*l.*, at the rate of the half value thereof?

This is exactly the case which has occurred to the Plaintiff and many other subscribers to the fund who stand in the same situation as himself. The Plaintiff entered the civil service of the *East India* Company in the year 1827, he retired in the year 1852, he had been twenty-five years in the civil service of the *East India* Company, of which twenty-two years had been spent in *India*, he was then sixty-one years of age and he was entitled to the annuity of 10,000 rupees, or 1,000*l.* sterling at the price of 38,085 rupees, which, according to the tables referred to, was the half value of that annuity for the remainder of his then life. The balance then standing to the credit of the Plaintiff, on the books of the trustee and managers of the *Bengal* Civil Service Fund, was 87,504 rupees, which, after deducting the 38,085 rupees leaves a surplus to his credit of 49,419 rupees, which is the amount now claimed by him.

On examining the regulations proposed by the *Bengal* civil servants, as altered by the directors, with reference to this question, one is struck, in the first place, by the total omission of all notice of any such case as that which has occurred and which has given rise to this suit. Throughout these regulations, no reference is made directly or indirectly to any payments by a subscriber exceeding the price he would have to pay for his annuity. No allusion is made to any refund under any circumstances, except that in the thirteenth clause, it is provided, "that any subscriber who may be dismissed from the honorable company's service, shall forfeit all right to any benefit from the institution and shall be entitled

entitled to no refund of any payments which he may have made." We are therefore driven in the absence of express enactment to consider which view of the case is either impliedly included in, or if not, is most consistent with, the frame of the scheme and the existing regulations. The clauses which may be said to relate more especially to this subject are the 1st, 10th, 11th, 12th and 30th.

The first is in these words:—"(1) The subscribers shall, from the 1st of *May*, 1825, contribute for the purposes of the funds one twenty-fifth part of their salaries and all other public emoluments, however denominated, compensation for travelling expenses excepted."

The 10th is—"(10) Should any subscriber, having resided in *India* in the civil service not less than twenty-one years, and being a member of the institution the full period of twenty-five years, retire from the service before the operation of an annuity may devolve on him, he shall be entitled to the same in his proper turn, without any payment to the fund, save what may be claimable under the following rules."

The 11th is—"(11) Any subscriber who may accept the tender of an annuity shall be required, to entitle him to such annuity, to pay to the institution, previous to the date at which the annuity is to commence, the difference between one-half of the actual value of the annuity on his life, and the accumulated value of his previous contribution, in case the latter quantity shall be less than the former; these values shall be determined as below provided."

The 12th is—"(12) Any member so choosing may decline

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decline paying the difference defined in the foregoing rule, and shall in such case be entitled to an annuity diminished in proportion to the sum by which the accumulated value of his contribution is less than one-half of the actual value of an annuity on his life."

These, therefore, do little more than specify the amount, if any, which the civil servant will have to pay should he accept the annuity when his turn comes.

Then comes the 30th, which is in these words:— "(30) To determine the accumulated value of the contributions of any subscriber, the accountant shall keep separate accounts for each member, and these accounts shall be annually made up with the rate of interest allowed by the company."

This, therefore, specifies how the sums already contributed by the retiring civil servant is to be ascertained. It would seem, therefore, if the matter rested on these regulations alone that the utmost that could be urged on the subject would be, to say that it was a *casus omissus*; but if so, it would be unfavourable to the Plaintiff, because to decide in his favor would be to import into the institution, to meet an unforeseen event, a regulation not only not specified, but not even included by any inference that could fairly be drawn either from the general scope of the scheme itself, or from any of the particular and individual clauses provided for its regulation. It would be impossible for this Court, in expounding the meaning of a contract, to adopt any such course. But on these clauses, the objection to the Plaintiff's case does not rest here; for what is more important is, that to decide in his favor, would not be merely to import a new regulation into the

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the institution, but one which would be inconsistent with some of those which are already established. The first regulation which I have read provides, that a subscriber shall contribute four per cent. from his income without any limit of time; *i. e.* that he is to remain a subscriber as long as he continues in the service of the company. The 10th provides, that after subscribing for twenty-five years, and residing in *India* twenty-two years, a subscriber may cease to be a subscriber, and retire from the service without forfeiting his right to an annuity in his turn, and without making any further payment than that specified in clause 11; that is, without doing more than paying the balance, if any, which may be necessary to make up the one-half value of the annuity. In other words, if the subscriber at that time has paid his one-half value of the annuity, he will have nothing more to pay; but if he have overpaid the one-half value, what more is to be done, according to the regulations? Nothing; for it is not stated that the excess is to be refunded to him. It might, no doubt, be extremely difficult to introduce a series of regulations, which should exactly specify when the subscription should cease, so as to fit exactly the time when the amount standing to the credit of the subscriber would precisely equal the one-half value of the annuity at the age when he chose and was able to retire; but if it had been the intention of the company and directors to effect such an object, nothing would have been more easy than to have approximated very closely to this end. They might have provided that the subscription to the fund should, at all events, cease at that time whenever it occurred, when, having regard to the age of the subscriber and the accumulated amount of his subscriptions, an amount was standing to his credit of not less than one-half of the value of the annuity he would be entitled to receive, if one could then be tendered to him for acceptance: and the

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the regulations, by way of further approximation to this idea of perfect equality, under all circumstances, if such had been the object, might have further provided, that when the annuity was afterwards tendered to and accepted by this civil servant, any accumulation over the one-half value of the annuity, which would necessarily have diminished in consequence of his increased age since the period when his subscription was stopped, should be refunded to him. But the contrary of all this seems to me to be contemplated; and looking at these regulations alone, it would seem to be provided, that the subscriptions are always to be paid by every person as long as he continues a civil servant, and that he is not to retire from the service without forfeiting all right to any annuity, unless he have subscribed to the fund for twenty-five years, and have passed twenty-two of these years in *India*.

This is how the matter stands when rested solely on the regulations themselves. Upon them exclusively the Plaintiff would, in my opinion, have nothing on which to found an argument in favor of his contention.

I then turn to the dispatch itself, and to the clauses which precede and accompany the regulations, of whose bearing upon the regulations themselves I have already stated my opinion. After bestowing a careful attention to the argument addressed to me, and which were founded on the clauses I am about to refer to, I am unable to discover any thing to control or alter the view which I have taken of the Plaintiff's case, as derived from the regulations themselves, but on the contrary, when taken as a whole, I find somewhat to confirm it. The clauses principally relied on by the Plaintiff are the following: the 52nd, 53rd, 55th, 56th and 57th. I read the 52nd and 57th, which are the most

most important and most favorable to the view of the Plaintiff. The 52nd is in these words:—

"The third point requiring attention is, the proportion of value of the annuity which should be paid by the annuitants, or in other words, what shall be the sum paid by a servant, including his accumulated subscriptions, to entitle him to an annuity, if otherwise eligible; upon which point we must observe, that we consider it of essential importance that, so far as may be practicable, the advantages afforded by the fund should be available by those eligible to receive them upon terms of strict equality."

The 57th may be termed a species of summary or winding up of the former ones. It is in these words:—

"But although, in the mode here proposed, all servants, upon becoming annuitants, *will pay half the value of their respective annuities and no more*, and will be, so far, placed upon an equal footing, yet it has not escaped our observation, that there will be a material difference in the value of the risks incurred by the several subscribers of losing by death, or early retirement, the amount of their contributions. The extent of the risk depends upon the sum contributed in each year, and upon the number of years for which the contribution has been paid," &c. &c.

The first of these regulations, therefore, it is contended, contemplates, as a foundation for the scheme, in the first place, strict equality, which would not, it is argued, be attained, if one civil servant contributed a much larger sum than another, and after having so done received only the same amount of annuity. To enforce and maintain this equality, it is argued by the Plaintiff, that it is essential to repay to the civil servant the excess which he has paid over and above the half value of his annuity. The other clause, the 57th, is, it is contended,

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contended, still more precise in the same direction; for it expressly lays down that the principle of the scheme is, that "all servants, upon becoming annuitants, will pay half the value of their respective annuities *and no more*, and will, so far, be placed upon an equal footing." For the Plaintiff it is argued (and apparently, at first sight, with great force), that it would be a direct violation of this rule to say, that when a civil servant has contributed out of his official income more than half the value of his annuity, that excess is to be retained, and he is not to have any increase made to his annuity. It is impossible to say that there is not great weight in these arguments, when these clauses are looked at alone without the rest of the document with which they are united; but taken in conjunction with the rest of the clauses which constitute the institution, it is, in my opinion, impossible to give to them the effect contended for by the Plaintiff.

In the first place, when we come to the clauses which specify the means by which the annuity fund is to be formed (from sixty to sixty-six, both inclusive), it is stated, that the fund is to arise from three sources, and three only, viz.:—1st, by subscriptions from civil servants proportioned to their official income; 2ndly, by contributions from the company; and 3rdly, by fines from persons being annuitants. In the former case, it is expressly laid down, that it is to be an inseparable condition, attached to all persons thereafter appointed writers, that they are to contribute four per cent. upon their salaries and allowed emoluments. There is no exception stated, no reduction allowed, no period specified when this subscription is to cease; but as long as any person is a civil servant, so long must he be a subscriber, and that he shall be a subscriber is to form a part of the covenant which he is to enter into with the *East India* Company.

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Company. I have already noticed, how easy and obvious it would have been to stop the subscription at the time when the amount standing to his credit equalled the half value of the annuity at the age which the subscriber had then reached. If such had been their intention, why did this clause omit to state the period when the subscription should stop, or be silent as to any refund? But what is still stronger, when we look at the words of this clause, according to their rigid and strict construction, they do not import that no civil servant is never to subscribe more than half the value of the annuity; but they import that he shall never pay any more than half the value of the annuity. In other words, it simply enacts, that the payment, if any, which he shall have to make, and which constitutes the third source by which the fund is to be supplied, shall not exceed what, together with his contributions to the first source from which the fund springs, viz., his subscription accumulated at six per cent. shall amount to the half value of the annuity of 1,000*l.* at his period of life. It might appear, at first sight, that this was a trifling and technical distinction to draw between the word "*subscribe*" and the word "*pay*;" but a more careful examination will shew, I think, that it is the true effect and meaning of all these clauses. There are three sources of income by which the fund is to be created. Two of these spring from the civil servants, viz., subscriptions and fines, which latter word is used for the payment of the half value of the annuity. The clauses from 52 to 57, inclusive, relate to the latter of these two sources of income. The word "equality," in the 52nd paragraph, has reference, therefore, exclusively to the equality of price to be paid for the annuity; so also the words "no more," in paragraph 57, have reference to the same point, viz., the amount to be paid for the annuity; so also the words "no more," in paragraph 57, have

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have reference to the same point, viz., the amount to be paid for the annuity. This point is also made clearer, by considering in what manner and to what extent the rules provide for the remaining course of income by which the fund is to be provided. This (which in these regulations is treated as the second source) is the contributions by the company. Now, by these regulations, it is expressly provided, that the company shall contribute such a sum, whatever it may be, in addition to the contributions of subscribers, as will be sufficient to enable the fund to grant the annuities in question.

"(61) With a view essentially to promote the welfare of this important class of the company's servants, to whom is entrusted the discharge of very arduous and responsible duties, and from a conviction that pecuniary advantage of equal extent could not so beneficially be communicated in any other mode, we have resolved, that, provided an annuity fund be formed in *Bengal*, upon the principles explained in this dispatch, and under such a modification as we shall prescribe of the regulations framed by a committee of the civil servants on the 28th *January*, 1822, *the company shall contribute whatever sum may be required in addition to the contributions of subscribers*, to enable the fund to grant such number of annuities as may be accepted under the prescribed regulations, not exceeding nine per annum."

Now the contributions of the civil servants consist of two distinct matters, viz., subscriptions and fines. If the contention of the Plaintiff prevailed, it would be necessary for the company not only to contribute what might be required for the purpose here specified, but also what, in addition, might be required for the purpose of refunding the subscribers the excess of the sum standing to their credit above the half value of their annuity. To effect, therefore, the objects of Plaintiff,

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this clause (61) must be modified, and its present import wholly varied. The expressed constitution, therefore, of the scheme, as propounded in this letter, negatives the argument founded on the clauses relied upon by the Plaintiff, and shew that these clauses must be intended to refer, and to be confined, to the case of the third source of income, viz., the case where the civil servant accepting the annuity has not standing to his credit, as a subscriber, as much as the half value of the annuity he seeks to obtain. The fact is, that not only is perfect equality, in all cases, not contemplated by the scheme, but the directors point out and the scheme itself shews, that equality is unattainable. It is prevented by the death, dismissal or resignation of a subscriber before obtaining his annuity: it is prevented by the circumstance, that prior claims may exhaust the fund, all which is confirmatory of the observation, that perfect equality was considered unattainable, and that the equality spoken of in the clauses in question refers exclusively to the payment to be made, in respect of which the third source of income was derived.

This view of the case is confirmed by another circumstance, drawn from the whole of the papers taken together: if we refer to the basis on which the scheme is founded, we find that the contention of the Plaintiffs would frustrate or impede one of the principal objects it was intended to attain. That object is thus stated by the directors in the opening of their observations on the proposal from *Calcutta* in clause 33, to produce "a quicker movement in the civil service." So, in the 43rd paragraph their object is stated in these terms:— "Those advantages should certainly be considered, because in order that the funds may be beneficial to the service, it is important that all the annuities from it, as they accrue, should be accepted by old servants, so that

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the fund may not be instrumental to the retirement of young and active servants, and it cannot be expected that old servants in the profession, as they generally are of lucrative offices, would be tempted to retire if the annuity did not afford a material addition to such income as the party may possess." Again, in paragraph 46, it is thus stated:—"As the efficiency and utility of an annuity fund must materially depend upon the inducement afforded by it to old servants to retire, and as it cannot be expected that civil servants will retire to *England* without adequate provision, we have come to the determination that the annuities should not fall short of 10,000 rupees each, payable in *England* at the rate of two shillings the rupee, being 1,000*l.* sterling."

The same view seems to pervade the whole of the documents on this subject. But if a refund of the excess of the sum standing to the credit of the civil servants on his subscription account above the half value of the annuity at the date of his retirement were allowed, it is manifest that it might, and in many cases must, have an effect subversive of this very object. Now, as 6*l.* per cent. was to be allowed by the company on the fund set apart for the payment of the annuities, and which fund consisted in part of the subscriptions of the civil servants, the effect is, that their subscription accumulates at compound interest at 6*l.* per cent. per annum. If a civil servant received the offer of a retiring annuity, at the period when the sum standing to his account equalled the full amount of the half value of his annuity, or nearly so, he might well find it for his advantage to decline accepting the offer, as in every year the half value of his annuity would diminish, and, in the meantime, the saving from his subscriptions would be accumulating at compound interest at 6*l.* per cent., all of which would come back to him, when, at

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some future time, he accepted the annuity. This would be the result if the Plaintiff's views of these regulations were the correct one. It is true that the Plaintiff does not, as I understand by his counsel at the bar, claim the accumulations on his subscriptions at compound interest at 6*l.* per cent., although he does so by his bill, and that he now only claims a refund of the actual excess paid by him since the time when his subscription fund amounted to the half value of the annuity; but it is manifest this distinction is not maintainable by any construction to be placed on any of the clauses of the scheme itself, and that if the Plaintiff is entitled to any refund at all, he is entitled to a refund of the whole excess of his subscription fund as it stands to his credit in the books kept by the trustees and managers of the institution.

Then again, the whole of the clauses which relate to the principal part of the scheme, and which contain the calculations upon which it is founded, negative the view put forward by the Plaintiff, both in its express words and in the general scope and spirit of them. Thus it is, that in the calculations mentioned in the 62nd clause, and worked out in the 71st clause, the interest is calculated on the balance of the fund in the hands of the trustees; but if, in any case, there was to be a repayment of subscriptions, what is calculated as the balance would not have been the real balance of the fund, as a part would have to be refunded to the civil servants, and accordingly in that event, all the calculations upon which the scheme is established would have been erroneous, and a wholly distinct set of figures and calculations would have been necessary. The prospective calculations of the scheme carried on for twenty-four years anticipates that the whole fund would be exhausted by the annuities accepted; so that, if the

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working of the scheme had been precisely what was anticipated by the directors, and which was the point to which they endeavoured to approximate, there would not have been a penny available to provide for any refund to any person whatsoever, and any refund, in any case, would have created a failure of funds to meet the payment of the annuities. I have already observed that on the hypothesis on which the Plaintiff's case is founded, viz., of perfect equality to all persons connected with the institution, although it would have been very difficult to arrive at that result precisely, in all cases, yet that a considerable approximation to it might have been made very easily, and arrived at by one or two very simple additional regulations, if such equality had been the object: but on the assumption that this perfect equality to all subscribers was intended, and that the subscriber is entitled to the refund now contended for, nothing can be conceived more clumsy than the whole scheme, as it would then stand. If the civil servant is to be entitled to a refund, why not stop the subscription when his account equals the half value of his annuity, and also, why not compel him to accept the annuity as soon as one can be offered to him? What possible explanation can be suggested for the *East India* Company taking the trouble to accumulate one twenty-fifth part of a civil servant's income and emoluments, at compound interest at six per cent., to be repaid to him when he thought fit to retire and accept his annuity of 1,000*l.* per annum? Then again, what possible explanation can be suggested for depriving of the whole excess of his subscriptions the estate of the civil servant who has notified his intention to retire and accept the annuity, but who dies the day before he retires, yet paying that excess to the executors of the civil servant exactly similarly situated, but who happens to live two days longer? Why also is the civil servant, who

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who has retired when he was entitled to do so under the 10th regulation, but without receiving an annuity, because the option of one had not then devolved upon him, to be entitled to receive back the excess of his subscriptions if he live long enough to obtain his annuity, but not if he die before the option of an annuity should devolve upon him?

It is needless to go on accumulating instances of the incongruity and want of harmony existing in all parts of the plan, on the hypothesis of the Plaintiff's construction. They spring up at every turn, but on the other hand, the plan, though not productive of equality in all cases, is perfectly consistent and harmonious, if the basis of it is supposed to be this; namely, that all persons must be subscribers to it, as long as they fill the character of civil servants. That if they die, or are dismissed, or retire from the service, not having resided in *India* twenty-two years, and not having been a member of the institution twenty-five years, they lose all their contributions and subscriptions, whatever may be the amount of them. That if they live to attain the annuity, they get it for nothing, provided their subscriptions, accumulated at compound interest at 6*l.* per cent., equal or exceed half the value of their annuity, and that if not, they have to pay the difference between their accumulated subscription and the half value of their annuity. That these subscriptions and this payment of the half value of the annuity, when it takes place, are to make up the sources of income of the fund; and that the *East India* Company provides what may be required to make up the annuities. This is plain and simple, and appears to me to be the scope of the whole scheme, and the regulations are, in my opinion, well drawn to express these intentions.

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The arguments, however, which appear to me to flow from the paragraphs I have referred to and from the general scope and purpose of the scheme, are attempted to be refuted by the Plaintiff in the following manner:—It is argued on his behalf, that this is a case of contract betw en the *East India* Company and each civil servant, and that it must be construed, therefore, according to the terms of the contract, and that the public letter to *Bengal* of *December*, 1824, so far as it relates to this subject, consists of two branches; first, the clauses which constitute the contract, and then the clauses which describe how that contract is to be carried into effect. This distinction, it is urged, is clear, and recognized in all cases, as for instance, when a vendor agrees to sell a messuage to a purchaser for a given sum; this constitutes the contract, but the necessity of making out and of accepting a good title, and of preparing and of executing the conveyance, are the means by which that contract is carried into effect, and which need not be expressed in the contract, but are necessarily incidental to it, and that still less can such clauses, if expressed, control the effect of the contract, but that they are to be treated on the well known rule, *expressio eorum quæ tacite insunt nihil operatur*. This argument is applied to the document before me thus:—it is urged that the clauses in this letter from 44 to 59, both inclusive, specify the terms of the contract, and that the clauses from 60 to 72, both inclusive, are merely the machinery by which the contract so expressed is to be carried into effect, and that, therefore, no inference can fairly be drawn from them to prejudice or injure the conclusions which fairly result from the words used in the first clauses. But, in truth, this distinction, though accurate in many cases, has not, in my opinion, any application to this case.

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I am of opinion that the contract is not contained in any of the earlier clauses, taken separately or conjointly, but that it is a contract made up of all the clauses of the letter, and that it can only be ascertained by taking them altogether. It is not, in my opinion, a contract to provide annuities for life to retiring civil servants, at a particular price, but it is contract to provide such annuities, in a particular manner and subject to certain specified conditions, all which conditions are essentially a part of the contract. In my opinion also, it is not a separate contract between the *East India* Company, and each one of its *Bengal* civil servants, but it is a contract between the *East India* Company and the whole body of their civil servants in *Bengal*, for the general benefit and advantage of that aggregate body, taken collectively. The contract consists in mutual engagements to perform certain acts by the body of the civil servants of *Bengal* on one side, and on the other side by the *East India* Company. The acts to be done by each party are specified in and are to be collected from all the clauses of this public letter, taken together, with the regulations which are appended to it. The pecuniary part of it is not the only part of the contract, but so far as that part is concerned, it seems to me to be distinctly to this effect; namely, that in consideration of the civil servants subscribing 4*l.* per cent. *per annum*, out of their pay and emoluments, as long as they are in the service, and in consideration of their paying what, if anything, may be required to make up the half value of their respective annuities, to be calculated according to the tables specified, the *East India* Company will grant and pay nine annuities annually of 1,000*l.* each, for the respective lives of nine retiring civil servants, and this Court can no more diminish the amount to be paid by the civil servants, than it can lessen the annuity to be granted by the company itself.

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This is, in my opinion, how the question stands upon the construction of the first class of documents, taken alone. Other considerations, however, have to be noticed. When the terms of a contract are plain, usage can little affect the construction to be placed upon it. When it is ambiguous, undoubtedly the usage for a long time may influence the judgment of the Court, by shewing how it was understood by the original parties to it.

If usage is to have any effect in this case, it is wholly against the Plaintiff. From the time of the establishment of this scheme, until the year 1835, that is for ten years, no refund, such as that sought by the Plaintiff, was ever made to anyone, nor indeed does it ever appear to have been claimed.

Still, however, the plan was not successful in accomplishing the object which was the great moving cause which influenced the *East India* Company to adopt it. The plan was based on the belief, that at least nine persons would be found, in each year, who would be desirous to accept the proposed annuity, on the terms so offered, and that, accordingly, nine annual vacancies in the civil service would, by this means, be produced. This expectation turned out to be delusive. Even in the absence of any refund, the advantages offered were not sufficient to induce a sufficient number of civil servants to retire. Accordingly, it so happened, that for several years after the establishment of the annuity fund in 1825, nine annuities in each year were not accepted by the subscribers. The consequence of which was, that the annuity fund increased to a considerably larger extent than had been anticipated, and the *quicker movement* in the civil service, intended to be effected by the scheme, did not take

take place. A memorial was, in consequence, addressed by the civil servants to the directors, praying for some modification of the scheme. To this the *East India* Company returned an answer of 27th *May*, 1835, in consequence of which, additional regulations were proposed for the management of the fund by the civil servants in *Bengal* in 1836, and were sent for approval to the *East India* Company. They were approved by the directors, in a letter bearing date the 3rd *May*, 1837. The effect and general scope of these proposals was, that in future, at the close of every year, two-thirds of the unaccepted annuities were to be offered to subscribers, in order of seniority, on payment of one-fourth, instead of one-half of the value of the annuity, and that in the event of the accumulated subscriptions, with interest, exceeding that one-fourth, the balance was to be returned to the subscriber. This arrangement was intended to be experimental, and it was proposed, that it should last for three years, in order that its effect might be tried. By this plan, it is to be observed, that the regulations expressly contemplate and enact, although only as a temporary and experimental measure, a refunding to the retiring civil servant of his subscriptions, if they exceed the price at which the annuity is to be purchased, which is fixed at one-fourth of its real value. It is not necessary to go very minutely into this scheme, which was adopted only as a temporary expedient, and was soon after abandoned; but it is to be observed, that it is not suggested that any alteration should be made in the original scheme, by which the annuities are first offered to the subscribers at half value, and that this principle of refunding is applicable only to that portion of the fund which is unapplied, by reason of the whole of the nine annuities not having been accepted. Practically, however, with this alternative to fall back upon, it was pretty evident,

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dent, that no one would accept the annuity on payment of half value, and, accordingly, under the altered scheme, six annuities instead of nine were granted in each year, upon payment of one-quarter instead of one-half of the value of the annuity, and, in the payment of that quarter, the amount standing to the credit of the subscriber was to be taken into account, and the balance, if any, in his favor, was to be repaid to him. This plan lasted some years, and under it, many persons, to the number of twenty-eight, received, from 1835 to 1842, annuities on these terms. This plan, however, was soon objected to by some of the civil servants who were low down in the list, unless it were made a perpetual arrangement, in which case, the permanent contributions to be made by the *East India* Company must have been very materially increased. The result of this was, that the new plan was abandoned, and the whole matter was discussed over again from 1838 to 1842, with a view to the permanent establishment of the institution.

This discussion gave rise to that which has been termed the third class of documents. They add little light to the subject now before the Court. By the 30th clause of the original scheme, any changes might be introduced into it, provided they were carried by a majority of three-fourths of the civil servants at *Bengal*, and were afterwards sanctioned by the directors of the *East India* Company. On the point before me in this suit, no alteration has been made, and therefore, unless the construction contended for by the Plaintiff is to be found in the original scheme, it does not now form any part of it. The short account of these last transactions is as follows:—In *January*, 1838, a memorial was sent by the civil servants to the directors, objecting to the refunding the excess of subscription as long as the price

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price at which the annuity is to be purchased was at one-fourth of its value. On the 1st *September*, 1841, the Court of Directors sent a dispatch to *Bengal*, in which, in the first place, they point out that the excess of the real balance of the fund over that which had been estimated as the probable balance when the institution was founded, had amounted to 2,794,663 rupees, and that the half of that sum was 1,397,331 rupees, and the directors suggest, that this half should be applied in reducing the amount to be paid by the retiring civil servants, by way of what is called the fine, for the purpose of obtaining his annuity. And, in the second place, they suggest, with respect to the refunding to the retiring civil servant, that it would be desirable to confine this refund to the excess which might be standing to his account, over and above the half value of the annuity. This matter was discussed by the civil servants in *Bengal*, in *January*, 1842, some modifications were introduced into the rules, which were sanctioned by the directors, but a clause, expressly enacting that the excess of subscriptions over and above the half value of the annuity should be returned to the retiring civil servants, was proposed and rejected by the civil servants at *Bengal*, in consequence of its not having the requisite majority of three-fourths in favour of it. All these proceedings, which I have not thought it necessary to notice in detail, leave the matter very much where it stood before. The arrangement in 1835 was but temporary, and has been finally superseded. A new regulation removing all doubts in the matter, by the express enactment of it, has not been adopted. It cannot influence the decision of this Court on this question, but in considering the argument to be derived from usage, it certainly is somewhat singular, that when this regulation was proposed and discussed, and also during the previous discussion as to the modification to be introduced

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troduced into the scheme itself, it should never have occurred to anyone to suggest, that the rules of the institution then in force contained the very provision which they were seeking to introduce into it; if in truth, with any show of reason, any such provision could be discovered in the existing regulations; or what is more material, any person could be found who believed that it had been intended to form a part of the original arrangement.

This is how the matter stands on the evidence, for what may have occurred at *Madras* or *Bombay* cannot affect the question. On the question of authority, there is little of much moment, but what little there is, is unfavorable to the Plaintiff. They consist of the decision of the Courts at *Calcutta* and at *Madras* on this subject. I think it unnecessary to examine them at any length, they can have no effect on this question, except so far as the Court may, in the judgment then pronounced, discover argument which may assist it on the present occasion. At *Calcutta*, the decision was adverse to the view of the Plaintiff. At *Madras*, the decisions were in accordance with his present contention. There is, however, a considerable distinction between the case at *Calcutta*, and that which occurred at *Madras*. The case of *Blunt* v. *Halliday*, which occurred at *Calcutta*, was a decision in *pari materiâ*, and although it will not bind this Court, which is compelled to exercise its own independent judgment on the subject before it, it unavoidably has a cousiderable effect on the judgment of this Court, when it finds, that the three learned and eminent judges who constituted the Court at *Calcutta* in 1852 have come to a conclusion unfavorable to the claim of a person similarly situated to the Plaintiff. With respect to the two cases at *Madras*, viz. the case of *Davis* v. *The Trustees of the Madras*

Madras Civil Service Army Fund, in *August*, 1856, and that of *Robertson* v. *East India Company*, in *September*, 1857, Sir *Christopher Rawlinson*, in deciding these cases, does not in terms dissent from the decision in *Blunt* v. *Halliday*, but expressly founds his decision on the fact, that a rule had been made and published in 1838, with the knowledge of the *East India* Company, expressly authorizing the refund which was claimed, and on the fact that the practice of refunding the excess of the subscriptions, over and above the half value of the annuity, had prevailed uniformly in that presidency, from 1834 down to 1851, without having been objected to. "How then," says Sir *Christopher Rawlinson*, referring to a rule passed by the civil servants in that presidency abolishing the refund, and to which a retro-active effect was endeavoured to be given, "How, then, is the Plaintiff to be deprived of the benefit of his payments, made on the faith of an express rule, and of an unvarying practice of more than twenty years in conformity with it, by the act of a majority, whose power so to bind him was not attempted to be shewn, and certainly no portion of the dispatches, or of the original regulations, contain any provision for such a proceeding, one *primâ facie* contrary to all the rules of equity and good faith."

It is impossible to dispute, that the strong inclination of Sir *C. Rawlinson's* argument and opinion, on the question of construction of the original documents, is in favor of the Plaintiff; but this was by no means essential for his decision, nor is it, in fact, rested upon them.

This, then, is how the matter rests on authority.

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Taking the whole together, then, I find that, on the face of the original document, the public letter to *Benyal* of 8th *December*, 1824, and the regulations attached to it, the construction which it bears is unfavorable to the Plaintiff, that the whole of the subsequent usage, under this document, is in accordance with this construction, that no alteration in conformity with the Plaintiff's view has since been made in these regulations, and that in the only case in which the question has come simply before the tribunals of the Courts in the *East Indies*, a decision has been pronounced in accordance with that construction and with that usage which negatives the case of the Plaintiff.

The case, therefore, of the Plaintiff wholly fails, and the bill must be dismissed.

NOTE.—See *The East India Company* v. *Robertson*, *Privy Council* (20 *June*, 1859), as to the right to a refund in the case of the *Madras Civil Service Annuity Fund*.

GREY *v.* JENKINS.

Jan. 28.
Feb. 12.

The effect and operation of the Settled Estates Act (19 & 20 *Vict.* c. 120) explained.

The expression "persons entitled," in the Settled Estates Act, means persons beneficially entitled, and all persons beneficially entitled must concur. Trustees can only consent for unborn children, but trustees with a power of sale may join in a sale which will bind all persons claiming under their trust.

THE question in this special case arose under the following circumstances:—By Mr. *Gordon's* marriage settlement, dated in 1832, the manor of *Portishead* and other hereditaments were conveyed to trustees, in trust for the use of Mr. *Gordon* for life, and subject thereto, to trustees for a term of 500 years, to secure a jointure of 600*l.* per annum to his wife, with remainder to the use of the children of the marriage other than the eldest, and in default of children to the use of Mr. *Gordon* in fee. There was a power to Mrs. *Gordon* to charge the property with 2,000*l.*, to be raised after her decease.

The trustees of the settlement had a general power of sale.

There was no issue of the marriage.

Mr. *Gordon* made his will in 1852, by which he devised his *Stocks* Estate to his wife for life, and subject thereto, as she should appoint, amongst all or some of the persons named, with remainders over in default of appointment. And after directing the executors of his will to expend in the enlargement and embellishment, repair and completion of the mansion-house called *Stocks House* a sum of money not exceeding in the whole 3,000*l.*, and bequeathing a legacy of 1,000*l.* to his wife, he gave, devised and bequeathed all the residue of his real and personal estate to trustees, upon trust to sell his real estate and to convert and get in

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his residuary personal estate; and after payment of his debts and the legacy bequeathed to his wife, and after setting apart a sum of 3,000*l.* for the purposes thereinbefore expressed, upon trust to pay such legacies and annuities as he might bequeath by any codicil, and upon trust to pay the clear residue unto his wife absolutely. He declared that the receipts of his trustees should be good discharges, and appointed the same trustees to be his executors.

The testator made several codicils to his will, by which he bequeathed many legacies, some of them of very large amounts, and several annuities.

Mr. *Gordon* died on the 4th day of *March*, 1854.

Mr. *Wolley*, the surviving trustee of the settlement of 1832, agreed to sell to *Jenkins* a portion of the hereditaments comprised in that settlement. The purchaser objected, that *Wolley* had no right to exercise the power of sale. Upon which a special case having been framed for the opinion of the Court (*a*), the Master of the Rolls, after argument, was of opinion that the trustee of the settlement could not exercise the power of sale contained in it, and that the power given by the settlement was, in fact, gone. This opinion was affirmed by Lord *Cranworth*.

A petition was afterwards presented, under the Settled Estates Act (19 & 20 *Vict.* c. 120), stating other contracts for the sale of other parts of the estate to *Joseph Jenkins* and others. On the 9th of *July*, 1858, the Master of the Rolls made an order authorizing the sale of the property included in the settlement.

Wolley

(*a*) *See Wolley* v. *Jenkins*, 23 *Beav.* 53.

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Wolley had died previously to the presentation of the petition, and the only parties to it, or to the order made upon it, were the widow of Mr. *Gordon* (now Mrs. *Bright*), her second husband, the trustees and executors of Mr. *Gordon's* will, and the trustees of the settlement made on Mrs. *Bright's* second marriage.

Several legacies given by Mr. *Gordon's* will remained unpaid, and in many of them infants were interested, and several of the annuitants were still alive.

The Defendant *Jenkins* still objected to the title, but he had agreed with the Plaintiffs (the trustees and executors of the will) to complete his contract provided a good title and conveyance could be made under the order for sale of the 9th of *July*, 1858.

The objection raised on behalf of the Defendant, *Jenkins*, to the completion of the contract was to this effect:—"It will be observed on a reference to Mr. *Gordon's* will, that he has given the *Stocks Estate* to Mrs. *Bright* for life, with divers remainders over, and has directed his executors to expend 3,000*l.* in improvements and repairs. This 3,000*l.* is, by a subsequent part of the will, made an equitable charge on the testator's residuary real estate, and it appears that all persons who have any interest in the *Stocks Estate* should, in respect of this 3,000*l.*, have been concurring parties in the petition, unless satisfactory evidence can be furnished that the 3,000*l.* has been expended according to the terms of the will. All the unpaid legatees, and all the annuitants, should also have concurred."

The Plaintiffs (the trustees of Mr. *Gordon's* will) submitted, that the objection was not well founded in any respect, and that all necessary and proper persons were

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parties to the petition, and that the creditors, annuitants and legatees, including those interested or who might be interested in the sum of 3,000*l.*, were not necessary parties to any petition, order or conveyance, but were sufficiently represented by the trustees and executors of the will of Mr. *Gordon*, and that the conveyance and receipt of such trustees (regard being had to the terms of the will and order) were a sufficient answer to the objection so raised.

The questions submitted for the opinion of the Court were as follows:—

1st. Whether there was any validity in the above objection?

2nd. Whether the Plaintiffs, as trustees and executors of the will of Mr. *Gordon* (regard being had to the petition and order), sufficiently represented the creditors, annuitants and legatees of Mr. *Gordon;* and whether the concurrence of such creditors, annuitants and legatees in such petition was not unnecessary; and whether a good title could be made to the Defendant without such concurrence.

This case was argued by Mr. *R. Palmer*, Mr. *Lloyd*, Mr. *Follett*, Mr. *Giffard* and Mr. *C. T. Simpson*.

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Feb. 12. The question on this special case is the effect of the 19 & 20 *Vict.* c. 120, which authorizes this Court to make sale of settled estates under certain restrictions specified in the act. The question is raised by the purchaser, Mr. *Jenkins*, who contests the authority of this Court to make the order under that act, and contends that, at all events, all the persons having a beneficial interest

interest under the will of the testator ought to have been parties consenting to that order, and that they must now join in the conveyance, in order to give him a good title. As this question is one of considerable importance, not merely to the present purchaser, but also to all persons who may sell or buy under this act, I was desirous to read and consider the provisions of the act very carefully before I pronounced any opinion.

It was urged on me by the purchaser, that the words "persons entitled," which are used in this act, mean the "persons beneficially entitled," and that the distinction is carefully drawn, throughout the act, between "persons entitled" and trustees:—that the consent of all persons entitled is rigorously insisted on by the statute, and that provision is thereby made for obtaining that consent from some competent representative in all cases of disability, and that the only instance in which trustees can consent is when they are trustees for unborn children. The various clauses of the act are referred to which establish these propositions, and thence it is argued, that as this estate is to be sold under the Settled Estates Act, all the persons beneficially interested in it must concur; that the *cestuis que trust* under the testator's will are persons beneficially interested in the estate sold, and, therefore, that their consent is necessary; and that their trustees have, under the act, no authority or power to consent for them; that the power of sale given to these trustees by the testator is merely an expression of his will, and that the will of the testator cannot supersede the will of the legislature.

In my opinion the case is very clear when the act is properly looked into and the effect and operation of it examined. I concur in the whole of the premises argued by Mr. *Lloyd*, but I dissent from his conclusion. I think

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I think that "persons entitled" mean persons "beneficially entitled," and that all persons beneficially entitled must concur; and I also think, that trustees, under the provision of the act, can only consent for unborn children. But I am of opinion, that, nevertheless, a good title can be made here, without the concurrence of the *cestuis que trust* under the testator's will.

The true distinction was, in my opinion, taken by Mr. *Palmer*, in his reply to the very able argument of Mr. *Lloyd*; and the distinction is this:—what the statute authorizes the Court to sell is all the interests included within the settlement, but nothing beyond this, and the provisions of the act have reference to this, and this alone; and, strictly speaking, the *cestuis que trust* under the testator's will are not persons having beneficial interests under the settlement.

I can best illustrate my meaning by adducing an instance. Suppose a man to have a beneficial lease of 100 years in certain property, and that on his marriage he settles the property included in this demise in the usual manner, on himself, his wife and his children, and that subsequently it becomes desirable to sell this property, but there is no power of sale in the settlement. This Court, under the Settled Estates Act, can sell this property, observing all the conditions and restrictions empowered by the statute. What the Court sells is merely the land included in the term for 100 years, and for as long as that term may last. But the reversion in the property, subject to the term, is not affected by the sale, nor is it within the provisions of the act. But go one step further, and suppose the reversioner to concur in the sale under the act directed by the Court, and that he is willing to convey his reversion to the purchaser: it is at his option to do so, but if he do concur, he

does

does not sell under the statute, nor is the reversioner in any respect affected by it, although on the consent of the reversioner the Court has directed the whole to be sold in fee simple. The act gives this Court power and jurisdiction to sell the land for the residue of the term of 100 years, and the reversioner gives the Court power and jurisdiction to sell the reversion of the land subject to the term, and thereupon the Court, so authorized, sells the whole. But it is the consent of the reversioner which completes this power. If the reversion be vested in trustees, who have a power of sale, they can concur in exactly the same manner as if they were the beneficial owners. In truth, a mortgage on an estate is occasionally so settled that the charge, or rather the lands included in that charge, might be sold under the Settled Estates Act, but such sale would not affect or dispose of the equity of redemption in the mortgagor, which may be disposed of either separately or conjointly.

In *Ireland* judgments are frequently the subject of settlements, and many judgments on the same estate are each subject to the trusts of a separate settlement; each of them might be sold separately under the Settled Estates Act, but such sale would not affect the surplus land belonging to the owner of the land subject to the judgment.

This is, I think, clear from the interpretation clause, as well as the general scope of the act.

Here, what is sold, under the authority of the act, is the interests comprised in the settlement of 1832, or so many of them as are now subsisting, and what the Court (so far as it derives its authority under the act) binds by the sale is only the interests arising under that settlement. Assume that there had been no power of sale given to the trustees in that settlement, and that application

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cation had been made to sell the property in the lifetime of the testator: the Court would have required the consent of the testator as tenant for life, the consent of the jointress in respect of her annuity of 600*l.*, and of her contingent charge of 2,000*l.*, and of the trustees as representing the unborn children, and of the testator again, also, as the reversioner. If the testator had sold his reversion, the purchaser would have had to give his consent, in the place of the testator. Again, if that purchaser had conveyed this reversion to trustees on certain trusts, the *cestui que trust* might or might not be required to consent, which would depend on the circumstances of the case. If by law, independently of the act, the trustees could have sold this reversion, their concurrence was all that would be required; but if that reversion was so settled as to require an interposition of the authority of the act to deal with it, then the *cestuis que trust* under that settlement would be required to consent; but it would then, in fact, be making one sale include two settlements and two exercises of the authority of this Court under the statute to deal with each. As in the instance I have suggested, of Irish judgments, if there were three judgments on the estate, each settled by a separate settlement, and the estate itself settled subject to the judgment, it might require four distinct exercises of the power of the Court conferred by the act to deal with and sell the whole, as free from all incumbrances: but if the trustees of any one of these judgments had power to dispose of it, without any assistance from the act, then their exercise of that power would bind that particular charge on the property, and the act in that case would not require the concurrence of the *cestuis que trust* interested in that charge.

This might be illustrated in various ways. A settlement

ment might require a specified sum to be raised and paid to *A.*, the concurrence of *A.* would be all that would be required by the act, but if he had disposed of his interest, whether to a purchaser, or trustee, or legatee, the consent of the alienee would be all that would be required, and this, notwithstanding that there might be ulterior interests created by him, provided that by law, independently of the statute, they were bound by the acts of his trustee.

Here, what is sold under the Settled Estates Act is the interests now subsisting in the settlement and created by it, but no more or further; all that the statute authorizes and the Court sells, therefore, is the jointure or annuity of 600*l.* to Mrs. *Bright*, the contingent charge of 2,000*l.*, and the reversion in fee. This reversion in fee is now vested in the trustees under the will of Mr. *Gordon*, who have just as much power to dispose of it as they would have had if they had been purchasers for value from him. They stand exactly in his shoes, for he had power to place them in his situation, and to invest them with the same powers over this reversion as he himself possessed, and he has done so. Accordingly, they will, by joining in the conveyance to the purchaser, give him as perfect a title, under the act and the order of the Court, as they could have done without it, in case he had been dead, and the charge of 2,000*l.* had been raised and paid.

The beneficial interest spoken of in this act is confined to the beneficial interest under the settlement. The trustees of the will represent and bind the beneficial interest in the reversion, and can make a good title to the purchaser. The questions must be answered accordingly.

DECREE.

Declare that the Plaintiffs sufficiently represent the creditors, annuitants and legatees, whose concurrence in the petition was unnecessary, and that a good title can be made to the property. *Reg. Lib.* 1858, *A. fol.* 1112.

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GASKELL *v.* CHAMBERS. (No. 3.)

Dec. 15, 16.

Directors of a company, on the transfer of its business to another company, received from the latter a large sum for compensation, the particulars of which they withheld from their members. *Held*, that they were trustees of the money for the members, and they were ordered, on an interlocutory application, to pay it into Court.

THE *London Mutual Life and Guarantee Society* was established in 1848, and completely registered in *October*, 1849. By the deed of settlement (8th of *October*, 1849), the profits were divisible amongst the policy holders. The affairs of the society were conducted by a board of directors, and an extraordinary general meeting of members was empowered to sell any portion of the business to any other company. The undertaking, according to the annual report of the directors and their representations, was very prosperous. However, in 1857, the directors, of their own motion, entered into negociations with the *Eagle* Life Insurance Society for the transfer to them of the business of the *London Mutual*.

Terms were ultimately agreed upon, giving the shareholders certain benefits on the transfer, and articles were signed in *August*, 1857. The directors of the *London Mutual Society* convened an extraordinary general meeting of shareholders, to be held on the 24th of *September*, 1857, in order to confirm the agreement. They forwarded circulars on the 29th of *August* to the members or policy holders informing them of the terms of the arrangements, but making no mention of any personal benefits to be derived by the directors and officers themselves by the proposed arrangements.

The extraordinary general meeting was accordingly held, and the assent for the transfer of the business was confirmed and afterwards carried into effect by the board of directors.

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The Plaintiff had insured his life in 1855, and was a shareholder, but he did not attend this meeting. He afterwards discovered that, on the transfer, considerable sums had been received from the *Eagle* by the chairman, directors and all the other officers of the *London Mutual*, by way of compensation, the particulars of which had been kept secret from the members of the *London Mutual*.

The Plaintiff thereupon instituted this suit against the chairman, directors, secretary, solicitors, medical officers and auditors of the *London Mutual*, and the *London Mutual* Society (which had not been dissolved), on behalf of himself and all the other members of that society, praying an account of the moneys so received by them, and that they might be declared trustees thereof for the members of the *London Mutual*, and be decreed to refund these sums and pay them into Court.

Seven of the directors put in their joint answer, by which they admitted that they had received from the *Eagle*, on the 15th of *December*, 1858, by way of compensation for the loss of their offices, the sum of 571*l.* 8*s.* 7*d.* each, making 4,000*l.* in the whole, under the arrangements for the transfer of the business. They, by their answers, defended their receipt of this money on various grounds, which are stated in the argument.

A motion was now made, upon the answer of the seven directors, that they might pay the 4,000*l.* so received by them into Court.

Mr. *R. Palmer* and Mr. *Beavan*, in support of the motion. First, directors of a public company are trustees for the members. That has been repeatedly decided in this Court, and even provisional directors have been

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been held to be trustees (*a*). Secondly, trustees can derive no benefit from their trust, every advantage which they can obtain from it belongs to their *cestuis que trust*. They can no more stipulate for a benefit on the sale of a business than they could arrange, on selling a real estate belonging to the trust, to receive a bonus. The cases on this subject are collected in *Lewin on Trusts* (*b*). If that be so, the money admitted by the directors to be in their hands is a trust fund belonging to the Plaintiffs, which, according to the authorities, ought to be brought into Court, and secured until the hearing of the cause; *Wiglesworth* v. *Wiglesworth* (*c*); and see *Rothwell* v. *Rothwell* (*d*); *Vigrass* v. *Binfield* (*e*); *Collis* v. *Collis* (*f*); *M'Hardy* v. *Hitchcock* (*g*); *Hichens* v. *Congreve* (*h*).

Mr. *Selwyn* and Mr. *W. D. Lewis*, for the directors. This motion is premature; the relief now asked is the proper subject of a decree, and is substantially the whole relief asked by the bill. The proper course would be, to set down the cause for a hearing and obtain this relief by a decree; *Peacham* v. *Daw* (*i*).

Secondly. There is a well-known and recognized custom, on the amalgamation of two companies, to make compensation to the directors, who lose their offices by the arrangement. This custom is so universal, that it must have been known to the Plaintiffs.

Thirdly. It appears that at the general meeting, the shareholders knew that this arrangement had taken place

(*a*) *Maxwell* v. *Port Tennant, &c. Co.*, 24 *Beav* 497.
(*b*) *Page* 318 (3*rd edit.*).
(*c*) 16 *Beav.* 269.
(*d*) 2 *Sim. & St.* 217.
(*e*) 3 *Mad.* 62.
(*f*) 2 *Simons*, 365.
(*g*) 11 *Beav.* 77.
(*h*) 1 *Russ. & M.* 150, *note.*
(*i*) 6 *Madd.* 98.

place and sanctioned it. It is stated, by the answer, that the question was put by a member, whether the officers of the company had been properly taken care of in the arrangement, and that the deputy chairman replied "that all persons connected with the office were to be liberally compensated." A member also wished to know the particulars of such compensation, but another member suggested that such question was not courteous to the board and was unnecessary, unless the members were dissatisfied with the terms of the amalgamation as regarded themselves.

Fourthly. It appears that before the terms had been finally agreed upon, the directors particularly inquired of the gentlemen employed by the *Eagle* to arrange the terms of the amalgamation, whether the bonus to the members would be affected, in any degree, by the compensation to be given to the directors and officers of the *London Mutual*, and they were distinctly informed that it would not. The money therefore was paid out of the funds of the *Eagle*, and not out of those of the *London Mutual*.

Lastly. The Plaintiff has received a bonus under the arrangements [2*l.* 0*s.* 6*d.*] and is therefore prevented complaining of it. If he rejects the terms of the arrangement, he must return the benefit he has received from it, and set the transaction aside altogether, and not partially. They cited *St. Victor* v. *Devereux* (*a*); *Boschetti* v. *Power* (*b*).

Mr. *R. Palmer*, in reply.

(*a*) 13 *Simons*, 641. (*b*) 8 *Beav.* 98.

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I have read this answer carefully, and I observe nothing more in it than counsel stated in argument. I am of opinion, however, assuming all the statements contained in it to be true, but taking them least favorably for the pleaders, that these Defendants are trustees of the fund, and that they must pay the amount into Court. I am also of opinion that they are trustees for the Plaintiff and the shareholders on whose behalf he sues. There is a clear admission that 571*l.* 8*s.* 7*d.* has been paid to each, and the order must be on each to pay that sum into Court, and not that each should pay the whole 4,000*l.*

I do not wish to go into the details of the case, or to prejudice the hearing. It is possible, as was stated, that when the evidence is given, it may be such as to give a different complexion to the transaction; but on the answer, as it stands, I am of opinion that the directors are trustees, and I must order them to pay the money into Court before the first seal after *Hilary* Term.

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Re THATCHER'S TRUSTS.

Jan. 12.
Feb. 9.

Distinction between a bequest having two alternatives, one of which is valid and the other too remote, and a gift depending on the failure of a previous limitation, which is too remote.

The case of *Taylor* v. *Frobisher*, 5 *De Gex & Sm.* 191, approved of.

Bequest to *A.* for life, and afterwards to her children equally, "to be vested" on such as should attain twenty-five, and "to be payable" as soon as might be after that age should be attained, with powers of maintenance and advancement out of their "vested or expectant portions," with a gift over to *B.* if no child should attain twenty-five: Held, first, that the gift to the children was too remote, and secondly, on *A.*'s death without having been married, that the gift to *B.* could not take effect, as an alternative limitation to a person in esse at the date of the will.

THE testator by his will, dated in 1835, gave one-fifteenth of the produce of his real and personal estate to his granddaughter *Elizabeth Hobbs* for life, and after her decease in trust for the child, if only one, and if more than one, for the children, of her the said *Elizabeth Hobbs*, the granddaughter, to be equally divided between or among the same children, if more than one, share and share alike, and *to be vested* in such of the same children as should be a son or sons when he or they should attain the age or respective ages of twenty-five years, or die under that age leaving issue, at his or their death or respective deaths, and on such of the same children as should be a daughter or daughters, when she or they respectively should attain the age or respective ages of twenty-five years, or be married (with consent), which, as to each of them, should first happen, and to be payable as soon after the respective ages or days should be attained, and also after the death of the said *Elizabeth Hobbs*, his granddaughter, as conveniently might be.

And in case any child of *Elizabeth Hobbs* "should depart this life, being a son or sons, under the age of twenty-five years, without leaving any issue living at the time of his or their death or respective deaths, or being a daughter or daughters should die under that age and without having been married" with consent, then

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then her share was to be divided between the other children.

"And in case there should be no child of *Elizabeth Hobbs*, who being a son should attain the age of twenty-five years, or die under that age leaving issue, or being a daughter should attain that age or be married with consent," the fund was to be held in trust, as to one moiety, for *William Hobbs*, and as to the other moiety upon the same trusts as were thereinbefore declared respecting another one-fifteenth, which the testator had previously bequeathed to *Ann Tuckwell* for her life, and afterwards to her children in a similar manner.

But in case the said *William Hobbs* and *Ann Tuckwell* should both have departed this life without leaving any child or children, or the issue of any deceased child, then the fund was to be held in trust for the testator's next of kin.

The will contained a power of maintenance out of income, and a power of advancement not exceeding 400*l.*, "of the then vested or *expectant* portion or share" of the children.

The testator died in 1836; *William Hobbs* died in 1839, leaving one child; *Elizabeth Hobbs* died in 1841, without having been married, and *Ann Tuckwell* died in 1856, having had six children, the eldest of whom was born in 1834, and the youngest in 1846.

The trustees of the fund, being advised that the trusts of the legacy subsequent to *Elizabeth Hobbs's* life interest were void as being too remote, paid it into Court under the Trustee Relief Act.

This

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This was a petition by the next of kin of the testator, praying payment to them of the fund.

Mr. *Follett* and Mr. *Wickens*, in support of the petition. First, this is a gift to those children only who should attain twenty-five; it is therefore too remote and void. Secondly, the subsequent limitation to Mrs. *Tuckwell* for life is not an alternative gift, but a limitation dependent on the failure of the prior one to the children, which is void, and it is therefore itself too remote, though in favour of a person *in esse* at the date of the will. They cited *Monypenny* v. *Dering* (*a*); *Gilbert on Uses* (*b*); *Boehm* v. *Clarke* (*c*); *Proctor* v. *Bishop of Bath, &c.* (*d*); *Chatham* v. *Tothill* (*e*).

Mr. *Haynes*, for the children of *Ann Tuckwell*, and Mr. *R. Palmer* and Mr. *C. Hall*, for the representatives of Mrs. *Tuckwell*. The limitation to the children is perfectly valid. There is a gift to them in the first instance, followed by a direction as to *vesting*; but the vesting here means *indefeasibly vesting*, as in *Taylor* v. *Frobisher* (*f*).

As to the life interest to Mrs. *Tuckwell* it is valid, because in any event it must take effect, if at all, with a life in being. The bequest to her is an alternative gift, and may take effect even if the gift to the children should be too remote. They also cited *Berkeley* v. *Swinburne* (*g*); *Poole* v. *Bott* (*h*); *Barlow* v. *Salter* (*i*); *Beard* v. *Westcott* (*k*); and see *Cambridge* v. *Rous* (*l*).

The

(*a*) 2 *De G., M. & G.* 145.
(*b*) *Page* 278, *note.*
(*c*) 9 *Ves.* 580.
(*d*) 2 *H. Black.* 356.
(*e*) 7 *Bro. P. C.* 453.
(*f*) 5 *De G. & S.* 191.
(*g*) 16 *Sim.* 275.
(*h*) 11 *Hare*, 33.
(*i*) 17 *Ves.* 479.
(*k*) 5 *Taunt.* 393; 5 *Barn. & Ald.* 801; *Turn. & R.* 25.
(*l*) 25 *Beav.* 409.

1859.

Re THATCHER'S TRUSTS.

Feb. 9.

The MASTER *of the* ROLLS.

The question in this petition is, whether the limitations contained in the will of *Thomas Thatcher* are too remote or not.

The first question is, whether the limitations to the children are too remote or not, and this depends upon whether the vesting of their share is postponed till they attain the age of twenty-five, or whether the vesting is immediate, and the time of payment only is postponed. Upon this point I do not entertain any doubt; the words are express: after the decease of the said *Elizabeth Hobbs*, in trust for her child or children, "to be equally divided between or among the same children, if more than one, share and share alike, and to be *vested* in such of the children as shall be a son or sons when he or they shall respectively attain the age or ages of twenty-five years." Unless the word *vested* is to be wholly disregarded, and no effect given to it, or its meaning reversed, it is impossible to say that the children take any vested interest until they attained twenty-five. If, on the contrary, the word *vested* were omitted altogether, there would be no gift except in the direction to pay; but here it is made doubly clear, by coupling the term vesting with the time of *payment*.

I entirely approve of the decision of Sir *James Parker* in the case of *Taylor* v. *Frobisher* (*a*), but the effect before me of that case has been, that whenever the word *vested* is used, this case is cited to shew that that word is not to bear its ordinary and primary signification. That case was perfectly different from the present, and I have on many previous occasions pointed out the distinction on

(*a*) 5 *De Gex & Sm.* 19.

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on which that case rests, which do not occur in the present.

The maintenance and advancement clauses in this will do not in the slightest degree affect my construction of the previous limitation. The power simply authorizes the trustees to apply what they may think necessary, in any manner they may think right, for the support and maintenance of the children, and the advancement clauses confirm the construction I have given to the former part of the will, for it distinctly points to the possibility of an advance being made out of *expectant shares*, that is, shares which are not vested. It is clear, therefore, that they were not to be vested before they were payable.

The words are distinct, and I am of opinion that the gifts to the children are not vested until they attain twenty-five, and that the limitations to them are too remote.

Then arises the question, whether the gift over to Mrs. *Tuckwell* for life is good, this being a limitation to a person in existence at the date of the will.

The distinctions on this subject are well defined, although they may not be in every case susceptible of a ready application to the particular words of a will. On the one hand, it is clearly settled, that if there be two alternative limitations, one branch of which is too remote, and the other of which is capable of taking effect, the Court will disregard the invalid limitation and give effect to that which is legal. *Longhead* v. *Phelps* (*a*) is an instance of this distinction, which rests

(*a*) 2 *W. Bl.* 704.

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Re THATCHER'S TRUSTS.

rests on sound and settled rules of construction. On the other hand, if the limitations are ulterior to or expectant upon limitations which are too remote, they are void also, although made to a person in existence at the date of the will.

The case of *Beard* v. *Westcott* (*a*), and *Monypenny* v. *Dering* (*b*), are instances of the second class of cases.

Nothing can be more distinct than the mode in which this is explained by Lord *St. Leonards*, both in his argument (*c*) and also in his judgment in *Monypenny* v. *Dering* (*d*). He says that the Court of King's Bench held the gift over in *Beard* v. *Westcott* void,—"Not because it was not within the line of perpetuity, but expressly on the ground I have adverted to, namely, that that limitation over was never intended by the testator to take effect, unless the persons whom he intended to take under the previous limitation would, if they had been alive, been capable of enjoying the estate, and that he did not intend that the estate should wait for persons to take in a given event, where the person to take was actually in existence but could not take; and Lord *Eldon* affirmed that decision. This shews that where there are gifts over, which are void for perpetuity, and there is a subsequent and independent clause on a gift over, which is within the line of perpetuities, effect cannot be given to such a clause unless it will dovetail in and accord with previous limitations which are valid."

This is strictly applicable to the present case; it is impossible

(*a*) 5 *Barn. & Ald.* 801.
(*b*) 2 *De G., M. & G.* 145.
(*c*) 5 *Barn. & Ald.* 808.
(*d*) 2 *De G., M. & G.* 182.

impossible here to say that the limitation to Mrs. *Tuckwell* is an alternative limitation; it is clearly one expectant upon the failure of the previous limitation to the children. It does not, to use the words of Lord *St. Leonards*, "dovetail in and accord with previous limitations which are valid," but it is intended not to take effect unless the children, whom he intended to take effect under the previous limitation, would have been capable of taking. The testator never intended Mrs. *Tuckwell* to take if there were children in existence but who were prevented by law from taking.

I am of opinion, therefore, that the whole limitation fails, and that an order must be made in accordance with the prayer of the petition.

DECREE.

Declare that the gifts over of the share of Miss *Hobbs*, after her life interest, are void, including the life interest of Mrs. *Tuckwell*.

1858.

HILL *v.* BONNER.

Dec. 2.

The Court cannot, under the 15 & 16 *Vict.* c. 86, s. 44, appoint a person to represent the estate of a deceased person who is not willing to act.

MR. *R. Palmer* and Mr. *Osborne*, on behalf of the Plaintiff, moved that *W. F. Hoper*, or some other fit and proper person, might be appointed, under the 15 & 16 *Vict.* c. 86, s. 44, to represent the estate of *Moses Hoper* deceased for all purposes of this suit, or that the suit might proceed in the absence of any representative.

Mr. *H. F. Bristowe*, for *W. F. Hoper*, objected to be appointed, and asked for his costs. He referred to the 20 & 21 *Vict.* c. 77, s. 44.

The MASTER *of the* ROLLS.

I cannot appoint a person as representative who is not willing to act. He must have his costs. Any order I now make might still be objected to by any of the parties at the hearing.

NOTE.—*See The Prince of Wales, &c. Association* v. *Palmer*, 25 *Beav.* 605.

HOOD *v.* COOPER.

Jan. 15.

When, at the hearing, liberty is given to mention the case again on the minutes, it must be done at least within a fortnight, otherwise the parties must give notice of motion specifying the alterations.

AT the hearing of this cause on the 3rd of *December*, 1858, The Master of the Rolls gave liberty to mention it again on the minutes, in the event of there being any difficulty.

Mr. *Rasch* now (15th *January*) moved, that the case might be placed in the paper, to be spoken to on the minutes as delivered out by the registrar, the parties not being able to agree as to them.

The MASTER *of the* ROLLS refused the application, on the ground of the delay. He stated, that when parties had liberty to apply on the minutes, they must avail themselves of it within a fortnight at the utmost.

He added, that the registrar might communicate with him, if he thought fit, on the matter, but that if he did not, the Plaintiff must give the usual notice of motion to vary the minutes and specify the variations he required.

NOTE.—*See Prince* v. *Howard*, 14 *Beav.* 208.

1859.

CARTER *v.* SEBRIGHT.

Jan. 28, 31.

The fines, fees and expenses of the admission of new trustees to copyholds must be borne by the tenant for life and those in remainder, in proportion to their respective interests.

THE testator was entitled to a copyhold house and premises at *Hackney*, held of the manor of *Kingshold*, for an estate of inheritance, to him and his heirs, at the will of the lord, according to the custom of the manor.

By his will he devised his freehold and copyhold hereditaments to two trustees, in trust to receive the rents and pay them to Mrs. *Sebright* for life, and after her death for the separate use of Mrs. *Hall* for life, with remainder to her children.

The testator made no provision for the payment of the fines, &c., attending the admission of the trustees to the copyholds.

The testator died in 1844, and the trustees caused themselves to be admitted to the copyholds.

The surviving trustee died in 1857, having devised all his property, of every description, to Mrs. *Sebright*.

In 1858, Mrs. *Sebright*, under a power, appointed the two Plaintiffs trustees of the will of the original testator; and she thereupon covenanted with them that she would be admitted to the copyholds, and surrender them to the Plaintiffs upon the trusts of the will.

The copyholds were worth 28*l.* a year, and the fines, fees and expenses attending the admittance would amount

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amount to about 150*l.* The Plaintiffs having no funds out of which they could pay the fines, &c., instituted this suit, praying that Mrs. *Sebright* might be directed to procure herself to be admitted to the copyholds, and to surrender the same to the Plaintiffs, upon the trusts of the will of the testator, and that the fines, fees and expenses might be raised by a mortgage or sale. And that it might be declared, that Mrs. *Sebright*, as tenant for life, ought to contribute to the fines, fees and expenses of and attending the admittances of herself and of the Plaintiffs thereto, in proportion to the benefit she might derive therefrom, and ought to give a proper security in respect of such her proportion.

Mr. *R. Palmer* and Mr. *Piggott*, for the Plaintiffs, cited *Playters* v. *Abbott* (*a*).

Mr. *Selwyn*, for the tenant for life, cited *Jones* v. *Jones* (*b*); *Bull* v. *Birkbeck* (*c*); *Hudleston* v. *Whelpdale* (*d*); *Greenwood* v. *Evans* (*e*).

Mr. *Lloyd* and Mr. *C. Hall*, for mortgagees under he tenant for life.

Mr. *Follett* and Mr. *C. T. Simpson*, for the remaindermen: *Lord Kensington* v. *Mansell* (*f*); *Lewin on Trusts* (*g*).

The MASTER *of the* ROLLS.

In this case the question really is, simply, whether the fine to be paid for the renewal of a copyhold is to fall on

Jan. 31.

(*a*) 2 *Myl. & K.* 97.
(*b*) 5 *Hare*, 440.
(*c*) 2 *Y. & C. C. C.* 447.
(*d*) 9 *Hare*, 775.
(*e*) 4 *Beav.* 44.
(*f*) 13 *Ves.* 240.
(*g*) *Page* 402.

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on the tenant for life and remainderman in the proportion of their interests in the property. I am of opinion that there is no distinction between fines for the renewal of copyholds and those for leaseholds, and that they stand in the same situation.

The authorities are clear and decisive on the subject when the devise is of the legal estate. Thus if there be a devise of a copyhold to *A.* for life, with remainder to *B.* in fee, it is quite clear, according to Lord *Eldon*, that the fine to be paid for the admission of the tenant for life, if it enures to the benefit of the remainderman, is to be borne by them in the proportion of their interests in the estate.

If the tenant for life be only admitted for his life, then the fine paid is in proportion to the value of his interest: but when persons are admitted for the benefit both of the tenant for life and the remainderman, they are merely trustees for both, and the same rule and principle apply.

All the text-books adopt that view of the question, and it is considered as not to be doubted by Serjeant *Scriven* in his work on Copyholds. I think also that *Playters* v. *Abbott* (*a*) is distinct, that this is the rule. I adopt the argument of Mr. *Follett*, viz. that if this be the rule for legal estates, it is equally so for equitable estates; and where one is admitted for the benefit of all, they ought all to pay in proportion to their interests.

It is the same principle as that which applies to the appointment of new trustees, which is very similar. The

(*a*) 2 *Myl. & K.* 97.

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The costs are there paid out of the estate generally or out of corpus, by which means the interests of the tenant for life and those in remainder are diminished in proportion and in the same way.

I am therefore of opinion that this fine must be borne by the persons in proportion, and that Mrs. *Sebright* must give security, according to the terms pointed out in the books, that she will bear her share of the fine.

WYNNE *v.* HUGHES.

Jan. 11, 24.

As to the jurisdiction of the Court of Chancery of the Palatine of *Lancaster* in cases where part of the subject-matter consists of lands locally situate out of its jurisdiction.

Suits were instituted for the same matter in the Palatine Court and this Court, and a decree made in the former. The Court refused to stay the proceedings here, as the suits partly involved lands locally situate out of the jurisdiction of the Palatine Court.

IN 1848, *John Edwards*, of *Chester*, conveyed some real and personal estate to *Thomas Hughes*, of *Denbighshire*, and *Harwood W. Banner* of *Liverpool*, in trust to sell and pay his debts, and to hold the residue for *John Edwards* and his executors, "as part of his personal estate." They, accordingly, sold a portion of the property, and paid nearly the whole of the debts.

In 1854, *John Edwards* died intestate, and administration was granted to *Thomas Hughes*, one of his next of kin, and who also claimed to be heir at law. The next of kin of the intestate consisted of sixteen persons, viz. *Thomas Hughes*, Mrs. *Wynne*, Mrs. *Read*, and thirteen others. The next of kin were resident, and the principal part of the real estate of the intestate was locally situate, out of the jurisdiction of the County Palatine of *Lancaster*.

On the 8th of *November*, 1858, a suit was instituted in this Court, by Mr. and Mrs. *Wynne*, against *Hughes* and *Banner*, for the sale of the property comprised in the creditors'

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creditors' deed, and the performance of the trusts thereof, and for the administration of the personal estate of the intestate.

On the 25th of *November*, 1858, two other suits were instituted in the Chancery of the County Palatine of *Lancaster*, the first by *Banner* against *Hughes* alone, and the second by Mrs. *Read* against *Banner* and *Hughes* alone. The first prayed the administration of the trusts of the creditors' deed, and that the rights of all parties to the unsold property might be determined, and the second prayed for the administration of the personal estate, the execution of the trusts of the creditors' deed, and the ascertainment of the rights of the parties in the property comprised therein.

Both suits raised the question, whether, by the subsequent acts of *John Edwards*, the unsold real estate comprised in the creditors' deed had been re-converted into realty, in other words, whether the next of kin or the heir at law of the intestate were entitled to it.

On the 29th of *November*, 1858, a decree was made in the two suits in the Palatine Court for the administration of the personal estate, and the trusts of the creditors' deed, directing an inquiry as to the next of kin and heir at law, and as to whether the creditors' deed had been revoked or determined, and the particulars of the property comprised therein, and ordering a Receiver of the estates and property comprised in the trust deed to be appointed, and that the tenants should attorn.

The decree was accordingly served on the Plaintiff in this suit, and a motion was now made by *Banner* and *Hughes* to stay the proceedings in the suit in this Court, on

on the ground, that a decree had already been made in the Palatine Court.

Mr. and Mrs. *Wynne* objected, that the present suit related partly to lands out of the jurisdiction of the Palatine Court, in regard to which its decree would be ineffectual.

Mr. *Selwyn* and Mr. *Little*, in support of the motion. This Court will prevent the prosecution of two suits for the administration of the same estate; and, as the whole relief may be obtained under the decree in the other suits, this suit ought to be stayed; *Rigby* v. *Strangways* (*a*). The decree in the other suits will be effective in determining the rights of the parties to the intestate's estate, whether locally situate within or without the jurisdiction of the Palatine Court, for the principle is this,—*Equitas agit in personam*. The decree will therefore bind the trustees and heir, who are parties, and the other parties may be summoned under the decree. Courts of Equity have frequently assumed jurisdiction in such cases. Thus, in *Toller* v. *Carteret* (*b*), which was a bill to foreclose a mortgage in the Island of *Sark*, a plea to the jurisdiction was overruled. In *Penn* v. *Lord Baltimore* (*c*) the Court held, that it would decree the specific performance of articles relating to lands in *America*; and in *Tulloch* v. *Hartley* (*d*) the Court entertained a bill to settle boundaries of a real estate in *Jamaica*. The suit of *Damer* v. *Earl Portarlington* (*e*) related to lands in *Ireland*; and *Omerod* v. *Hardman* (*f*), which was a suit for specific performance in the Duchy Court of *Lancaster*, part of the property was copyhold in *Yorkshire*.

The

(*a*) 2 *Phillips*, 175.
(*b*) 2 *Vern.* 494.
(*c*) 1 *Ves. sen.* 444.
(*d*) 1 *Y. & C. C. C.* 114.
(*e*) 15 *Sim.* 380; 2 *Phillips*, 30.
(*f*) 5 *Ves.* 722.

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The Palatine Court of *Lancaster* has power to deal with the lands out of the jurisdiction, for it has before it the two trustees, who have the legal estate, and the heir at law and some of the next of kin: the others may, by order of the Lords Justices, be served with the decree out of the jurisdiction; *Chalmers* v. *Laurie* (*a*), and 15 & 16 *Vict.* c. 86, s. 42, rule 8.

[*The* MASTER *of the* ROLLS:—Then, if your argument prevailed, that Court would have concurrent jurisdiction with this, and there would be no reason why any suit whatever should not be filed in that Court instead of this: it would make it another Vice-Chancellors Court. I doubt very much whether the Acts of Parliament extending the jurisdiction of the Palatine Court intended to enable a gentleman residing in *Kent* to file a bill in that Court against his neighbour, for the specific performance of an agreement for a gavelkind estate situate in *Kent*. The 17 & 18 *Vict.* c. 82, s. 11, speaks of "all lands and personal estate within the said County Palatine."]

Service of the bill out of the jurisdiction could only be authorized by the Lords Justices (*b*), who would refuse to make the order in any but a proper case. The 11th section relates merely to the appointment of trustees (*c*).

Mr. *Lloyd* and Mr. *Haynes, contrà.*

The Court of Chancery of the County Palatine of *Lancaster* has no authority over lands not locally situate within its jurisdiction (*d*). The decree was obtained, by consent, in a friendly suit instituted purposely to

(*a*) 10 *Hare, App. xxvii.*
(*b*) *Waltham* v. *Goodyear*, 7 *De G., M. & G.* 76.
(*c*) *In re Omerod*, 28 *L. J.* (*Ch.*) 55.
(*d*) 6 *Vin. Abr.* 570; 4 *Inst.* 204.

to defeat the present, and the objection to the jurisdiction was never raised, as it might have been.

There is no instance of staying proceedings in this Court, upon a decree made by a Court of limited jurisdiction, and the Court of *Lancaster* has no jurisdiction over lands out of the County Palatine. That Court has not the means of enforcing its decrees out of its jurisdiction, and it cannot compel the tenants to attorn to the receiver when appointed.

To give jurisdiction, both the persons and the land must be in the county: here the persons beneficially interested are all resident out of the jurisdiction, and this is the proper *forum* for determining the questions between them.

In *Davis* v. *Davis* (*a*), a plea to a certiorari bill, that the lands charged, and all matters, did lie and were situate and did arise within the County Palatine of *Chester*, was allowed.

In the *Lord Coningsby's Case* (*b*), a demurrer was allowed to a bill in the Duchy Court to recover lands, &c., because it omitted to aver, that the lands lay within the limits of the Duchy. The Court "all agreed that the Duchy was a circumscribed jurisdiction, and that in all such jurisdictions, the Plaintiff in his bill or declaration ought to shew that the cause did arise within the jurisdiction, otherwise the Defendant may take advantage of it by demurrer."

Mr. *Selwyn* in reply.

The following cases were also cited:—*Kinsey* v. *Kinsey*

(*a*) *Finch*, 451. (*b*) 9 *Mod.* 95.

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Kinsey (*a*); 13 *&* 14 *Vict. c.* 43; 66*th General Order of the Palatine Court, Rule* 8, *Winstanley, p.* 212; 2*nd General, Order, July,* 1855, *Winstanley, p.* 252.

The MASTER *of the* ROLLS.

Jan. 24. This was a motion to stay the proceedings in a cause in this Court by reason of a decree having been pronounced in the same matter and between the same parties in the Duchy Court of *Lancaster*. There can be no question, but that, if the two Courts have co-extensive jurisdiction, and the two suits are so constituted that all that is required in one may be obtained under the decree in the other, this Court will stay the proceedings in the suit in which no decree has been pronounced, and will allow the other to proceed.

But it is necessary for that purpose to consider what the circumstances of this case are. They are shortly these:—[*His Honor stated them*].

The same question, as to the re-conversion of the property into realty, arises in both suits, and, in the course of the proceedings, it may become absolutely necessary to sell the real estate for the purpose of distributing it amongst the next of kin, if they should be declared entitled.

Part of the real estate in question is situate in the county of *Chester* and out of the jurisdiction of the Duchy Court of *Lancaster*, and I am of opinion that I cannot, in that state of circumstances, stay the suit in this Court, though, if the Duchy Court of *Lancaster* had complete and entire jurisdiction over the whole matter, I should not hesitate to do so.

The

(*a*) 2 *Ves. sen.* 577.

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It was pressed upon me very strongly, that the Duchy Court of *Lancaster* can do everything that can be required in the cause; that the Court acts *in personam*, and that, although it has no authority over the land itself, yet as it has authority over all the persons who are in any manner interested in the land, and as all those persons are or may be made parties in the suit, it can make a complete and effectual decree in the matter.

But besides several objections and difficulties, which were suggested by Mr. *Lloyd* with respect to a receiver, it is obvious that a sale, under the authority of the Court and by the decree of the Court, of land over which it has jurisdiction is a perfectly different thing from what it is where it directs persons who are before the Court to sell land over which the Court has no jurisdiction. Questions of payment of money into Court, questions of opening biddings, questions of title, all assume a different aspect; in fact a sale by the Court of land not within its jurisdiction cannot take effect in the Duchy Court of *Lancaster*. And, without going into long details, which must be familiar to every person accustomed to the practice of the Court of Chancery, and the various questions that arise in consequence of it, I am of opinion that I might put the Plaintiffs in the suit in Chancery in very considerable difficulties, if I were to say that they shall not go on with their suit at all.

I think, therefore, the proper course for me to take is, not to stay this suit, but to refuse this motion. At the same time, I shall reserve the costs until I see what course may be taken in the two suits, and the mode in which they are conducted. On the fullest consideration of the case, I am satisfied that I cannot safely stop this suit.

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I do not place any weight at all on the fact that it was filed before the other, because the decree is the ground on which the Plaintiff would be entitled to move to stay this suit, if the same relief could be obtained equally in both suits. But on the fullest consideration that I have been able to give to it, I do not think that this is the case.

NOTE.—On appeal to the Lords Justices (10th *Feb.* 1859), the proceedings were stayed, but, as I have heard, by arrangement.

Jan. 21, 22, 24. *March* 18.

ADDAMS *v.* FERICK.

Where shares not fully paid up are specifically bequeathed, the question, whether the specific legatee or the residuary estate is liable to the future instalments, depends on whether the calls are actually made before the testator's death.

A testatrix bequeathed shares in a company. Before her death, three calls were authorized at stated intervals, but she died before two of these periods:—*Held*, under the circumstances and from the practice of the company, that the calls were not to be considered as really made, until a call letter had been sent to the shareholders, and that as to those sent after the testatrix's death, the specific legatee, and not the residuary estate, must bear the calls.

Executors held entitled to no indemnity against liability in respect of shares in a banking company specifically bequeathed, the order of the Court, in an administration suit, being of itself a perfect indemnity to them.

THE testatrix, Miss *Lewis*, died on the 17th of *February*, 1858. At the date of her will and codicil, she possessed 629 shares of 25*l.* each in the *Union Bank of Australia*, which were fully paid up, and 159 new shares in the same bank, on which, at the date of the codicil (12th *March*, 1857) only 2*l.* 10*s.* per share had been paid. She had, in the usual way, covenanted with the trustees of the company to pay all instalments that might be duly required thereon, and to observe the covenants in the deed of settlement of the company.

By her will, dated in 1856, she gave her residue to the Plaintiff Miss *Addams*, and appointed the Defendants *Ferick* and *Lowndes* her executors.

Miss *Lewis* made a codicil to her will, dated the 12th

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12th of *March*, 1857, whereby she bequeathed as follows:—

"Of my shares in the *Union Bank of Australia*, on which as yet only the first instalment of 2*l.* 10*s.* per share is paid, I bequeath as follows: to *Eliza*, wife of Colonel *Kingston Phibbs*, forty shares for her separate use; to *Harriette Pyper*, widow, thirty other of the said part paid shares for her use; to *Caroline*, daughter of the Reverend *John Colborne*, forty other of the said part paid shares for her use, and to *Sarah*, wife of *Henry Dobbin*, forty other of the said part paid shares for her separate use."

At the death of the testatrix, the instalments on these shares had not been fully paid up, and the first question in the cause was, whether the instalments paid subsequent to her death ought to be borne by the specific legatees of the shares or by the general personal estate of the testatrix.

It is now necessary to state the circumstances relating to these shares which gave rise to the question. The *Union Bank of Australia* was established in 1837, and was regulated by a deed of settlement dated in that year.

The 35th clause of the deed provided, that a special general meeting should have full power to increase the capital of the company to any amount, not exceeding the sum of one million, by the sale of new shares, at such prices and within such time and manner of payment, as might be thought requisite, and should authorize the board of directors to make such calls in respect of such new shares as might be deemed necessary.

And it was thereby further provided, by clause 54,

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that a special board of directors, called for that purpose, shall have full power to require and call for the payment, by each proprietor, of a further instalment of such sum, not exceeding 2*l.* 10*s.*, as the board might think proper, on every share held by him or her in the said company, and so, from time to time, until the whole sum of 25*l.* should have been paid on or in respect of such share; "but no such further call shall be made prior to the first day of *January* next, and no subsequent call shall be made until the expiration of three calendar months next after the immediately preceding call, and no call shall be made until the expiration of twenty days next after the same shall have been advertized in the *London* Gazette and two daily morning newspapers."

Clause 59 provided, "that no proprietor, holding any share or shares upon which any call, duly made by the board of directors, shall not have been paid, shall be entitled to sell or dispose of such share or shares, or receive any dividend or bonus thereon, or to vote at any meeting of the proprietors of the said company, or exercise any other right or receive any advantage whatsoever in respect of such share or shares, until such call shall have been fully paid, together with all interest thereon; and that if any proprietor shall sell or dispose of such share or shares contrary to this provision, such sale shall be void, and the share or shares so attempted to be sold or disposed of shall be liable to be declared, by the board of directors, forfeited to the company."

Provision was made, in the usual form, for the transfer of shares to legatees with the approval of the directors.

In *June*, 1841, the company, under the power contained in the deed of settlement, resolved on increasing the capital by the issue of new shares of 25*l.* each.

They

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They were accordingly issued and allotted to the existing shareholders; and the first call on them of 2*l.* 10*s.* was made payable on the 14th of *January*, 1842. The testatrix held one hundred and fifty-nine of these new shares, on which she had duly paid the first instalment.

No further call was made for some considerable time; but at a board of directors, held on the 24th of *December*, 1857, it was resolved, "that in consideration of the increased business of the branch and of the colonies generally, also of the additional branches opened during the present year, it is the opinion of this board, that the remaining capital of the bank, 180,000*l.* (being 22*l.* 10*s.* per share on 8,000 shares of the third issue), be called up. That the times and mode of doing this be notified to the proprietors in the report to be submitted at the next special general meeting."

On the 8th of *January*, 1858, the board of directors "resolved, with reference to the board minute of the 24th ultimo, that it is expedient to call up the unpaid capital of 22*l.* 10*s.* per share on the shares of the third issue, in the proportions and at the dates following, viz.:—

7*l.* 10*s.*	on 1st of *February*	next.
5*l.*	on 1st of *April*	„
5*l.*	on 1st of *July*	„
5*l.*	on 1st of *October*	„

The directors made their report to the special general meeting of the proprietors on the 11th of *January*, 1858, stating that they had resolved that it was expedient to call up the unpaid capital on the shares of the third issue, and that they had therefore fixed the following periods and amounts for the calls on those shares:—

7*l.* 10*s.*	per share	on the	1st of *February*	then next
5*l.*	„	„	1st of *April*	„
5*l.*	„	„	1st of *July*	„
5*l.*	„	„	1st of *October*	„

The

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The special general meeting unanimously approved and adopted the report, and it was resolved, "that the periods and instalments fixed by the directors for calling up the unpaid capital on the third series of shares should be thereby authorized and approved."

On the 16th of *January*, 1858, a printed circular was sent by the secretary to the testatrix and the other shareholders, which was as follows:—

"I have to notify to you, that by a resolution passed at the extraordinary general meeting of the proprietors of this bank, held at this office on the 11th instant, and in accordance with the course pursued in the issue of the second series of shares, as then stated by the directors, you are required to pay within the current half-year the sum of 12*l.* 10s. on your 159 shares of the third issue in the following manner, that is to say, 7*l.* 10s. on the 1st of *February*, and 5*l.* on the 1st of *April* next, in regard to which payments, these shares will become entitled to rank proportionably with the other paid-up capital in the dividend of profit declared for the half-year ending the 31st *December* next. And further, you are required to pay within the half-year commencing 1st *July* next 10*l.*, namely, 5*l.* on said 1st of *July*, and 5*l.* on the 1st of *October*, after which payments the shares will become entitled to rank in common with the full paid-up capital in the dividend of profit declared for the half-year ending 30th *June*, 1859. These shares will be liable to forfeiture if the several instalments are not paid on the days appointed."

A notice accompanied this letter, with a receipt at the foot, which was in these words:—

"In terms of the enclosed circular, I beg to inform you, that the second instalment of 7*l.* 10s. per share on 159 shares of the third series, held by you in this bank,

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bank, must be paid on or before the 1st of *February* next to Messrs. *Glyn, Mills & Co.*, Bankers, *Lombard Street*, who will give you their receipt as at foot."

At the foot of this letter was a form of receipt in these words:—

"Received, on account of the directors of the *Union Bank of Australia*, the sum of £ : : , being an instalment of 7*l.* 10*s.* per share on 159 shares of the third series, called pursuant to the resolution of the general meeting of proprietors held on *January* 11th, 1858.

"For Messrs. *Glynn & Co.*"

In pursuance of this notice, the testatrix, on the 28th of *January*, 1858, paid the first call of 7*l.* 10*s.* on her 159 new shares, and she died on the 17th of *February* following, as before stated.

On the 16th of *March*, 1858, a circular was addressed to the holders of the new shares, and amongst others to the executors of the testatrix, which was in exactly the same terms as before, except that it did not say "in the terms of the enclosed circular," but simply, "I beg to inform you that the third instalment of 5*l.* per share on the 159 shares of the third series is to be paid on or before the 1st of *April* next to Messrs. *Glynn, Mills* & Co., bankers, *Lombard Street*, who will give you their receipt as at foot." The receipt was exactly in the same form as the former.

Thereupon, the executors of the testatrix paid the second instalment out of her general estate. The same course was adopted with respect to the third and the fourth instalments; fourteen days before the instalments became due, namely, on the 16th of *June*, 1858, and on the 16th of *September*, 1858, similar circulars were sent for

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for the payment of the instalments on the 1st of *July* and the 1st of *October*.

There was evidence that between the 1st of *February* and the 1st of *April*, 1858, new shares in the company were transferable in the books of the company, as shares on which 15*l.* remained to be paid; and between the 1st of *April* and the 1st of *July*, 1858, as shares on which 10*l.* remained to be paid, and between the 1st of *July* and the 1st of *October* as shares on which 5*l.* remained to be paid. It also appeared, that a great number of such shares had been actually transferred, by instruments of transfer, executed by the sellers and buyers, and recorded in the books of the company between those respective dates, and that the previous approval by the directors of the transfers had been required and given.

Under these circumstances, the specific legatees of the shares insisted that all the calls paid after the death of the testatrix ought to be borne by her residuary estate. On the other hand, the residuary legatee contended that they ought to be paid by the specific legatees personally.

This suit was instituted for the administration of the estate, and under the decree the accounts had been taken, and the cause now came on for further consideration.

Mr. *Toller* and Mr. *Edward F. Smith*, for the Plaintiff, cited *Armstrong* v. *Burnet* (*a*); *Parslow* v. *Dearlove* (*b*); *Utterson* v. *Vernon* (*c*); *Price* v. *Nixon* (*d*); *Foley* v. *Fletcher* (*e*).

Mr.

(*a*) 20 *Beav.* 424.
(*b*) 4 *East*, 438.
(*c*) 4 *Term R.* 570.
(*d*) 5 *Taunt*, 338.
(*e*) 28 *L. J.* (*N. S.*) *Exch.* 100.

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Mr. *Selwyn* and Mr. *W. P. Murray* for the executors.

Mr. *R. Palmer* and Mr. *Rodwell*, for the specific legatees, cited *Marshall* v. *Holloway* (*a*); *Blount* v. *Hipkins* (*b*); *Jacques* v. *Chambers* (*c*); *Wright* v. *Warren* (*d*); *Clive* v. *Clive* (*e*); *Armstrong* v. *Burnet* (*f*); *Companies' Clauses Act*, 8 & 9 *Vict. c.* 16, *s.* 16; *The Sheffield, &c. Railway Company* v. *Woodcock* (*g*); *Ex parte Tooke* (*h*); *London and North Western Railway Company* v. *M'Michael* (*i*); *The Birkenhead, &c. Railway Company* v. *Webster* (*k*).

Mr. *G. J. Wood* for another specific legatee.

Mr. *Toller* in reply.

The MASTER *of the* ROLLS.

March 18.

The question is, whether the last three instalments which were paid by the executors ought to be repaid by the legatees of the shares respectively, or whether they are properly payable out of the general personal estate.

Having regard to the cases on this subject, and to the view which I took of them in the case of *Armstrong* v. *Burnet* (*l*), which I am disposed to follow on the present occasion, I think that this case must depend simply on this question of fact, viz. whether the calls were actually made before the death of the testatrix, or whether they were not.

In

(*a*) 5 *Sim.* 196.
(*b*) 7 *Sim.* 51.
(*c*) 2 *Coll.* 435.
(*d*) 4 *De G. & Sm.* 367.
(*e*) *Kay*, 600.
(*f*) 20 *Beav.* 430.
(*g*) 2 *Railw. Cas.* 522.
(*h*) 6 *Railw. Cas.* 1.
(*i*) 6 *Railw. Cas.* 495; 5 *Exch. Rep.* 855.
(*k*) 6 *Exch. Rep.* 277; 6 *Railw. Cas.* 498.
(*l*) 20 *Beav.* 424.

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In looking over the report of my decision in that case, it is obvious that in the observations that I made on that occasion, I foresaw that the principle I there laid down might occasionally lead not only to some difficulty, but to a technical mode of solving a question of the description now before me; but upon reflection, I think that this cannot be avoided.

It is clear, that if the testatrix had died before the report of the directors, made at the meeting of the 11th of *January*, 1858, the subsequent calls would, consistently with the rule I have laid down, have fallen upon the legatee of the shares who accepted the legacy; but the question which I have to determine here, in the view I have taken of the case, is, whether what occurred prior to the death of the testatrix amounted to a call of the three instalments which were paid subsequently to her death. This requires a somewhat critical examination of the facts relating to those calls, which for that purpose I have already detailed.

These facts are certain, that on the 11th of *January*, 1858, the report to the meeting recommended that the shares should be called up in full; that there then remained 22*l.* 10*s.* to be paid up, and that the report recommended, that it should be called up by four calls, on the four days stated; and that on the 16th *January*, 1858, a circular was sent to the shareholders intimating this to them.

It is contended, by the legatees, that this circular constituted a valid and effectual call for the payment of each of the four instalments. On the other hand, it is contended by the residuary legatee, that this is not a call for the payment of the instalments, but simply notice that the calls would be made: this is insisted upon

upon, principally, in consequence of the subsequent notice given to the shareholders to pay the instalments, and which, it is argued, is the real call, as appears by the construction put on the deed of settlement by the company itself, in conjunction with its practice in regard to these shares.

Upon the whole, and after some hesitation, I have come to the conclusion that the resolution of the 11th of *January* and the circular of the 16th of *January* constituted merely a notice, that the subsequent calls would be made, although I am of opinion that the paper which accompanied the circular of the 16th of *January*, and of even date, was a call of the first instalment. It may perhaps be asked, if this was a call of the first instalment, why was it not a call of the second, third and fourth, as the same words are used; but I think that the answer is to be found in the subsequent notice for the payment of the calls, which was sent regularly, about a fortnight before each payment was required, and which notice accompanied the circular at the same time, given on the 16th of *January*.

In order accurately to consider which of the applications ought to be designated "the call," I have been referred to the mode in which the company itself regarded it. This is obvious, that the opinion of the company itself is paramount in determining the question of what is to be treated as a call and what is not. I find, that from the practice of the company it must be held that the second notice, that is to say, the notice given a fortnight before the time when actual payment was required, was the real call, and not the former notice. This is, I think, established by a regulation of the company, which is clause 59 of the deed, which declares "that no proprietor holding any share or shares

upon

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upon which any call duly made by the board of directors shall not have been paid shall be entitled to sell or dispose of such share or shares," &c., "until such call shall have been fully paid, together with all interest thereon, and that if any proprietor shall sell or dispose of such share or shares contrary to this provision, such sale shall be void, and the share or shares so attempted to be sold or disposed of shall be liable to be declared by the board of directors forfeited to the company."

Now I have evidence before me that after the first notice, and up to the time when, at all events, the final notice was given, the shares were permitted to be transferred in the books of the company. I have not any evidence before me whether any transfer was permitted between the fortnight which elapsed between the final notice of the call and the time when the call was actually payable. But this being the mode in which the company itself has dealt with the matter, and as after a call had been made no transfer was to be permitted, and as they have permitted transfers, I am of opinion that this is the construction which they have put on their own deed, and that it is not a mere relinquishment or abandonment of the provisions of the deed.

It was observed with regard to the 54th clause, that it directed that no call should be made until after the expiration of twenty days after the same should have been advertised in the *London* Gazette and in two *London* newspapers; and it was argued, that this provision for allowing the transfer of shares was merely an abandonment of the provisions of the deed: I inclined to that view at first; but I find, upon further consideration, and by reference to the letter written by the secretary on the subject, which points out the distinction, that advertisements

tisements were not required in respect of the further shares, but related simply to the original shares, and accordingly the secretary observes, in the letter which was handed up to me, and which was admitted to be given in evidence, though not proved, that "no advertisements of these calls were inserted in the Gazette, such not being required by clause 35 of the deed of settlement, as per copy inclosed, that being the clause governing the final increase of capital, and under which powers were taken by the board of directors from the proprietors in regard to the new shares."

I think, therefore, on a full consideration of this case, that the calls of payments of the instalments, of which the final notice was given after the death of the testatrix, must be paid by the legatee, and not out of the general residuary estate of the testatrix.

A second question was also raised in this suit under these circumstances :—Besides the shares in the *Union Bank of Australia*, the testatrix was also entitled to forty-two 100*l.* shares in the *London and Westminster Bank*, but upon which 20*l.* per share only had been called and long since paid. That bank was established in 1834, and 20*l.* per share were paid up prior to 1836, and no further call had since been made. The shares in both banks were at a very high premium, and they had considerable reserve funds.

The executors alleged, that they were entitled to require a sufficient part of the residuary estate to be set aside, in order to meet all the possible demands which might, at any time, be made against the estate of the testatrix, during the space of three years from the

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the transfer of the shares in the two banks to the legatees, in respect of the liabilities of the testatrix's estate upon such shares.

Mr. *Selwyn* and *W. P. Murray* for the executors, argued that these shares, being in banking companies of unlimited liability, and one of them being unincorporated, a fund ought to be set aside for the protection of the executors against all liability respecting the shares; *Waller* v. *Barrett* (*a*); *King* v. *Malcott* (*b*); *The Official Managers of the Newcastle Banking, &c. Company* v. *Hymers* (*c*).

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No doubt is raised as to the solvency of the banks, and it is not necessary to set apart a fund. The executors, if they have brought all the facts before the Court, are perfectly indemnified by the order made by the Court to transfer the shares; but if they have wilfully suppressed any material facts from the Court, that order will afford them no protection.

(*a*) 24 *Beav.* 413. (*b*) 9 *Hare*, 694. (*c*) 22 *Beav.* 367.

NOTE.—*See* 22 & 23 *Vict. c.* 35, *ss.* 27, 28, 29.

1858.

DEAN *v.* LETHBRIDGE.

Dec. 15.
1859.
Jun. 11.

IN 1858, the usual foreclosure decree was made, and accounts were directed to be taken.

The Defendant's solicitor died, and the Plaintiff (being unable to find the Defendant) could not proceed in the accounts directed by the decree. The Court ordered substituted service of a subpœna to name a new solicitor, and the Defendant having failed to appoint one, the Court directed the accounts to be taken in his absence.

Before the accounts had been completely taken, Mr. *Heath* (the solicitor on the record of the Defendant *Lethbridge*) died; Mr. *Lethbridge* had left his residence in *Church Street* and it was not known where he now resided, but he called occasionally in *Church Street* for letters. The Plaintiff, being unable to proceed in taking the accounts, he having no means of serving the summonses, moved for an order for substituted service of a writ of *subpœna* calling on the Defendant *Lethbridge* to name an attorney in the place of Mr. *Heath* deceased.

Mr. *Charles Wood*, in support of the motion, referred to *Gibson* v. *Ingo* (*a*).

The MASTER *of the* ROLLS ordered that service of the *subpœna* at *Church Street*, at the residence of Mr. *Heath*, and on the professional gentleman who represented the estate and business of Mr. *Heath*, should be good service of the writ; and he directed notices to be served, that on the Defendant's default in naming a solicitor the Court would be moved that the accounts, &c. might be taken in his absence.

(*a*) 2 *Phillips*, 402.

Service having

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DEAN v. LETHBRIDGE.

January 11.

Service having been made accordingly, but no solicitor having been named,

Mr. *Charles Wood* now moved, upon notice on Mr. *Lethbridge* served in the same manner under the order of the 15th of *December*, "that the subsequent accounts, inquiries, taxation of costs, and proceedings in this cause, might be taken and prosecuted in the absence of the Defendant *Lethbridge*, without further notice to him."

The MASTER *of the* ROLLS made the order.

WILSON *v.* FOSTER.

Re THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Jan. 13, 14.

Upon a petition presented by the tenant for life, for the re-investment in land of the compensation money paid for lands taken by a railway company, the remainder-men and trustees, if they approve, ought to join in the petition or abstain from appearing at the hearing.

Costs of remainder-men and trustees, who appeared as Respondents upon a petition presented both under the Lands Clauses Act and in a suit for re-investment in land, disallowed.

UNDER the will of Sir *Henry Wilson*, who died in 1832, an estate in *Yorkshire* stood limited to the Defendant Mrs. *Wilson* for life, with remainder to the Plaintiff *Henry Wilson* for life, with remainder (subject to the possibility of Mrs. *Wilson* having any issue) to his son, the co-Plaintiff *H. Smithson Lee Wilson*, an infant, in tail.

Mrs. *Wilson* and her husband were living apart, and by articles for a separation, Mr. *Wilson* had covenanted to convey his wife's life estate to certain trustees for her separate use.

The

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WILSON v. FOSTER. *Re* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

The *Lancashire and Yorkshire Railway Company* had taken part of the settled estate for the purposes of their undertaking, and had paid the purchase-money into Court.

Mrs. *Wilson*, the tenant for life, having contracted to purchase some pieces of land from the company, for the purposes of settlement, presented this petition, praying that the contract might be carried into effect, that 272*l.* might be paid for it out of the money in Court, "and that the costs of and relating to the purchase, and of this application, and the order to be made thereon, and all reasonable costs and charges incident thereto," might be directed to be paid by the *Lancashire and Yorkshire Railway Company*.

The above suit of *Wilson* v. *Foster* had been instituted for carrying into execution the trusts of the testator's will and for administering his estate. The petition was, therefore, presented both in the act and in the suit, and the remaindermen (the Plaintiffs in the suit) and the trustees, who were Defendants in it, were served with the present petition. They appeared at the hearing of the petition, and the question was, whether the company were liable to pay the costs of their appearance.

Mr. *Barry* in support of the petition.

Mr. *Rogers*, for the Plaintiffs, the remaindermen, argued that, under the Lands Clauses Consolidation Act (8 & 9 *Vict.* c. 18, s. 80), the company ought to pay the costs of all the parties to the present petition, which had necessarily been presented both in the suit and the matter. He relied on *Picard* v. *Mitchell* (*a*); *Re Hull and Selby Railway Company* (*b*).

Mr.

(*a*) 12 *Beav.* 486. (*b*) 5 *Railw. Cas.* 458.

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WILSON v. FOSTER. *Re* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Mr. *Warren*, for the trustees of the separation deed, also asked for their costs.

Mr. *J. J. Hamilton Humphreys*, for the company. It was not necessary to serve the trustees of the separation deed or the remaindermen with this petition; for the orders authorized by the 8 & 9 *Vict.* c. 18, s. 69, are, by the 70th section, to be made "on the petition of the party who would have been entitled to the rents and profits of the lands," that is, by Mrs. *Wilson*. But even if they were necessary parties, they should have joined as co-Petitioners, or, as they support the application, they ought not, as Respondents, to have appeared at all at the hearing. The company is therefore only liable to pay the costs of the Petitioner.

In *Hore* v. *Smith*, *Re The South Devon Railway Company's Act* (*a*), V. C. *Knight Bruce* held, that where a sum of money had been paid into Court, for the purchase of land, to the account of a railway company, and there being a suit which rendered it necessary to present the petition for payment of the money in the matter of the company's act and in the cause, the company were liable to pay only the costs occasioned by the petition being presented in the matter of the act, and the costs of the parties were directed to be costs in the cause.

The MASTER *of the* ROLLS.

Jan. 14. I am of opinion that the company cannot be required to pay the costs of the remaindermen or of the trustees. I concur in the decision in *Hore* v. *Smith*, and I am also

(*a*) 13 *Law T.* 399.

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also of opinion that on applications for the re-investment of compensation money in land, the parties ought to join in the petition, which they might have done under the act, if not in the cause. The trustees and remaindermen who approved of this purchase and of the investment in land ought not to have appeared as Respondents, and I cannot require the company to pay their costs.

The company must pay all the costs of the Petitioner and the costs of serving the other parties with the petition, but not the costs of the appearance of the remaindermen and of the trustees, which, in my opinion, was unnecessary. All that was necessary was an affidavit of service on them.

The *extra* costs may be paid out of the fund in Court.

1859.

COURSE *v.* HUMPHREY.

Jan. 13, 14.

Two trustees, who severed in their defences, were allowed one set of costs only. One of them, by his answer, imputed misconduct to the other, which rendered it necessary for him to sever, and he asked for the whole costs. The Court being unable, on the answers, to determine the question, left the division to the Taxing Master.

THIS suit was instituted by the widow of the testator against *Humphrey* and *Hayward*, the executors and trustees of his estate. The bill imputed misconduct to both, and it sought to remove them, and to charge them with interest on their balances.

The two executors severed in their defences, and put in separate answers. *Humphrey*, by his answer, imputed misconduct to his co-executor, which he said had rendered it necessary for him to sever in his defence.

A decree having been made for an account, 73*l.* was found due from *Humphrey*, and 29*l.* from *Hayward*. The cause came on for further directions, and the only question was as to the costs of the trustees.

Mr. *Waller*, for the Plaintiff, argued, that the trustees were not justified in severing in their defences, and in incurring two sets of costs. He asked that, in the taxation, they might be allowed one set of costs only.

Mr. *Smale*, for *Humphrey*, argued, first, that the form of the bill justified the trustees in severing; and, secondly, that if the Court allowed them one set of costs only, then that *Humphrey* was entitled to it, inasmuch as the suit had been occasioned by the misconduct of his co-trustee *Hayward*.

Mr. *Tripp*, for *Hayward*, said, that he was ready to pay the small balance found due from him, and he

argued

argued, that there had been nothing in his conduct which could justify his being deprived of his costs, or, at least, of his share, if one set only should be allowed to the two trustees.

The MASTER *of the* ROLLS. *Jan.* 14.

After perusing the answer carefully, I still think that I cannot make the Plaintiff pay more than one set of costs. It is one of the misfortunes incidental to the acceptance of a trust, that it occasionally involves the trustee in litigation and expense, through the misconduct of his co-trustee, even when he himself acts with perfect propriety. This possibly may be a case of that description, but if so, it does not appear on the evidence before me; and as the case stands, I see nothing to justify the severing of the two trustees.

It may be, that the misconduct of *Hayward* compelled *Humphrey* to act and answer solely, in which case, the costs ought to be given to *Humphrey* and denied to *Hayward;* but I cannot determine that to my satisfaction as between co-Defendants on the answers, which is the only evidence before me on this point. If they were allowed to go into evidence they would be entitled to have the issue heard and determined, which is contrary to the practice, and would involve a great and useless expense.

They must have but one set of costs, and the division must be left to the Taxing Master.

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MASON *v.* BATESON.

Jan. 27, 28.

Bequest to all and every the sons and daughters of *A.*, including who the illegitimate of *A.* Held, that the illegitimate children of *A.* could not take.

BY his will, dated in 1832, the testator gave his residuary real and personal estate to trustees, upon trust for his daughter *Ede* for life, and afterwards for her children. The testator then proceeded in the following terms:—"And I do hereby direct, that in case my said daughter shall die without leaving lawful issue her surviving, or leaving such issue all of whom shall die under the age of twenty-one years, then the whole of the rents, interests, dividends and produce of my said real and personal estate shall remain and be in trust for my said wife, for and during the term of her natural life, and after her decease, the whole of my said real and personal estates and effects shall go, remain and be in trust for all and every my nephews and nieces, the sons and daughters of my said sister *Rebecca Mason*, including who the illegitimate of the said *Rebecca Mason*, equally to be divided between and amongst them, share and share alike, as tenants in common, and their, his or her heirs, executors, administrators and assigns."

The testator died in 1853.

It appeared that in 1807, the testator's sister *Rebecca* had married *Thomas Mason*, and that, prior thereto, she had had three illegitimate children by him. She had also two legitimate children after her marriage, and she died in 1857. The evidence shewed that these five children had been all brought up alike by *Thomas Mason*,

son, without distinction, and that he regarded them all alike. The children were born as follows:—1797, *Harriet*. 1801, *Sarah*. 1805, *John*. 1813, *Hannah*. 1815, *Henry*.

The testator's daughter had married and was living, but she had no children.

This bill was filed by *Harriet*, *Sarah* and *John*, the three illegitimate children of the testator's sister, praying a declaration that they were entitled to three equal fifth parts of the testator's real and residuary personal estates, subject to the life interest therein of the testator's daughter *Ede*, and the contingent interest of her children, if any she should have.

Mr. *R. Palmer* and Mr. *Busk*, for the Plaintiffs, argued that the gift was not rendered invalid by the blanks, which had been left in order to specify the names, for, independently, there was a clear gift to "*all*" the children, "including" the illegitimate. That this plain gift was not rendered inoperative for want of the additional description.

Mr. *T. Stevens*, for *Hannah* and her husband.

Mr. *Selwyn*, for the testator's daughter and her husband, cited *Pratt* v. *Mathew* (*a*); *Taylor* v. *Richardson* (*b*); *Doe* d. *Gord* v. *Needs* (*c*).

Mr. *Follett* and Mr. *C. Hall*, for the trustees and executors. The gift is void for uncertainty, for it does not specify which of the illegitimate children are to be included. Again, a gift to a class after a tenancy for life

(*a*) 22 *Beav.* 328.
(*b*) 2 *Drew.* 16.
(*c*) 2 *M. & W.* 129.

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life includes all born before the expiration of the life estate, and would therefore include future born illegitimate as well as future born legitimate children. But they cannot take together, and besides, such a gift to future illegitimate children would be void; *Illingworth* v. *Cooke* (*a*).

Mr. *Palmer* in reply.

The MASTER *of the* ROLLS said his present impression was, that the Plaintiffs could not take; that the testator, no doubt, intended to fill up the blanks, which it was possible to do in many different ways, by inserting the singular or plural, and the different combinations of the names of the three illegitimate children; but that if the Court supplied the blanks in any one of those ways, it would be making a will for the testator.

He also said, that if the words "all and every" were introduced, that might include future born illegitimate children as well as future born legitimate children, which would make the gift invalid.

(*a*) 9 *Hare*, 37.

Jan. 28. *The* MASTER *of the* ROLLS retained his opinion, and dismissed the bill without costs.

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Feb. 16
April

WILLIAM PUGH married in 1816. There was issue of his marriage five children, viz., *William Buckley Pugh*, his eldest son, the Plaintiff Mrs. *Beddoes* and three others.

A tenant or life had power to appoint, to any of his children, an estate, which, in default, was limited to his eldest son in fee. The eldest son attained twenty-one in *January*, 1841, and in *February* the father appointed the estate to him absolutely. In *May*, the father and the son mortgaged the estate for the father's debts, and in *July*, the father and eldest son conveyed the estate to a trustee, to indemnify the son against the mortgage debts, and then to sell and divide the surplus between all the children equally. *Semble*, that the latter deed was not void as part of a transaction constituting a fraud on the power; but *held*, that the deed of *July* must be treated as valid until set aside by an independent proceeding for that purpose in a suit, by a younger child, to carry it into execution.

A settlement, dated the 9th of *April*, 1816, was executed on the marriage of Mr. *Pugh*, of certain lands in the county of *Montgomery*, whereby they were limited to the use of *William Pugh* for his life, with remainder to his wife for her life, and after the decease of the survivor, to the use of such one or more, exclusively of the other or others, of the child or children of the marriage, or of the issue of any of the same child or children who should predecease the survivor of the father and mother leaving issue, for such estates and interests, and in such parts and proportions, as *William Pugh* should, by deed or will, appoint; and in default of appointment, or so far as such appointment should not extend, then to the use of the first son of the intended marriage, his heirs and assigns for ever.

The Defendant, *William Buckley Pugh*, the eldest son of the marriage, attained twenty-one on the 21st of *January*, 1841. At that time, his father, who had a very

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DATES.

1816, Settlement.	5 *May*, 1841, Mortgages.
21 *Jan.* 1841, *W. B. P.* attained 21.	19 *July* „ Settlement.
19 *Feb.* „ Appointment.	*Mar.* 1842, *W. P.* died.

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very large unsettled estate, incumbered apparently to its full value, was in great pecuniary distress. To relieve him from his difficulty, and preserve the unsettled property, he was very desirous of obtaining the assistance of his eldest son in raising money on the security of the settled estates. Accordingly, for this purpose, the father, in the following month, namely, on the 19th of *February*, 1841, irrevocably appointed all the settled property to his eldest son, *William Buckley Pugh*, in fee; and on the 5th of *May* following, the father and the son jointly executed four mortgages, whereby the settled estates were mortgaged for various debts of the father, amounting in the whole to upwards of 28,000*l*.

By indenture dated the 19th of *July*, 1841, and expressed to be made between *William Pugh* of the first part, *William Buckley Pugh* of the second part, the Plaintiff, Mrs. *Beddoes*, and the other three children, of the third part, and a trustee of the fourth part, (after reciting, amongst other things, that there were four children of *William Pugh* besides the Defendant *William Buckley Pugh*, and that *William Pugh* and *William Buckley Pugh* were desirous that some provision should be made for the benefit of the children, and that they had agreed to execute such conveyance and settlement for that purpose, as therein contained, *William Pugh* covenanted with *William Buckley Pugh*, that all the real and personal estate comprised in the thereinbefore mentioned indentures of mortgage, executed by *William Pugh* previous to and in *May* then last, should be a security to *William Buckley Pugh* for his indemnity against all losses, in consequence of his joining in the same indentures) *William Pugh* and *William Buckley Pugh*, according to their respective estates, granted to the trustee and his heirs

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the hereditaments comprised in the settlement of the 9th of *April*, 1816, and all and singular the other hereditaments comprised in the several mortgages, to hold the same, subject to the said mortgages and indemnity, unto the trustee, upon trust for sale and out of the proceeds to indemnify *William Buckley Pugh*, and, subject thereto, to pay 470*l.* to one of the children (Miss *Pugh*), and, subject thereto, to invest the trust moneys and to stand possessed thereof, in trust for the five children of *William Pugh*, in equal shares as tenants in common.

A memorandum was delivered and explained to *William Buckley Pugh* before he executed this deed, which was to the following effect:—"In pursuance of the trusts of his marriage settlement, Mr. *Pugh* had certain property for his own life, with a power of appointment, after his death, in such manner as he should think fit amongst his children. To prevent the sale of the property (which would not have fetched nearly what it may at some future period) held by certain parties as security for various sums of money, Mr. *Pugh* subjected his life estate above mentioned to the payment of such sums, and, to render the security still better, exercised a power of appointment over the trust estate in favour of his eldest son alone, who then joined with his father in securing the said sums on the trust estates, it being, however, always understood, between the father and son, that the trust property should ultimately (subject to the charges affecting it) be settled for the benefit of all Mr. *Pugh's* children equally. The accompanying deed carries out this intention, giving, however, 470*l.* to Miss *Pugh* in addition to her share. There is a full power of revocation contained in the deed exercisable by Mr. *Pugh* and his eldest son jointly."

On the same day, Mr. *Pugh* made his will, whereby he

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he gave and bequeathed all his real and personal estate to his eldest son, *William Buckley Pugh* (except the settled property, over which he thereby stated he had already exercised the power of appointment reserved to him), upon trust for the equal benefit of himself and the other children, share and share alike.

In the following month of *March*, 1842, *William Pugh* died, and in 1845, the Defendant, *William Buckley Pugh*, filed a bill against the mortgagee to set aside the deeds by which those debts were charged on the settled estates. The suit was subsequently compromised in a mode which was not fully explained, but which substantially removed the greater part of those incumbrances from the land.

William Buckley Pugh, having refused to account to Mrs. *Beddoes* for her share of the produce of the settled estates, to which she was entitled under the trusts of the deed of 1841, she and her husband filed this bill against him and the other children, praying a declaration that *William Buckley Pugh* was a trustee for himself and his brother and sisters, equally, of the real and personal estate and effects of which *William Pugh* died seised and possessed, and of the real and personal estate comprised in the marriage settlement of the 9th of *April*, 1816, appointed by *William Pugh* to *William Buckley Pugh*, subject nevertheless to the incumbrances affecting the same and the indemnity, if any, to which *William Buckley Pugh* might be entitled under the deed of the 19th of *January*, 1841.

That an account might be taken of the real and personal estate and effects of *William Pugh* and the incumbrances affecting the same and the settled property so appointed, and for a receiver.

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The Defendant *William Buckley Pugh* insisted that his concurrence in the transaction of 1841 had been improperly obtained, and that the appointment by the donee of the power for his own benefit was a fraud on the power and wholly void. The effect of this would be to give the settled estates to him alone as the eldest son, as in default of appointment.

Mr. *R. Palmer* and Mr. *J. F. Villiers* for the Plaintiffs.

Mr. *Goldsmid* and Mr. *Eddis* for the Defendant *William Buckley Pugh.*

Mr. *Selwyn* and Mr. *Bevir* for the other Defendants.

The MASTER *of the* ROLLS.

April 20.

This is a suit to carry into effect the trusts declared in a deed of the 19th of *July*, 1841, executed by the Defendant *William Buckley Pugh.* The Plaintiffs are his sister (one of the *cestuis que trust* under that deed) and her husband. The two last Defendants are also *cestuis que trust* under the deed, but they disclaim all interest in the subject matter of this suit.

The first and principal Defendant contests the validity of the deed; he contends that it was part of a transaction whereby the donee of the power executed it for his own benefit, and induced the Defendant, who was his son, to unite with him and become his instrument in the matter, and that consequently the whole transaction is void, and that the Court can give no effect to any part of it.

I concur in thinking it difficult to understand how the execution of the powers to effect mortgages of the settled estates to secure the debts of the father could have

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have been sustained; but the question before me is, whether the deed of 19th *July*, 1841, is so intimately connected with the mortgages, and with the appointment for the purpose of effecting those mortgages, that it must be treated as wholly void by this Court.

But assuming that the appointment of the 19th *February*, 1841, made for the purpose of enabling the father to charge the settled estates with his debts, is altogether bad, this does not, in my opinion, dispose of the question before me. If the appointment had never been made, but that the son had executed a declaration of trust of the estates in favor of himself and his brothers and sisters, and that in consideration of his having so done, the father had abstained from executing a power of appointment, would this Court have allowed the son to say, that the deed so executed by him was not binding upon him, and that the whole was to be disregarded? I think not. I think that this Court would, in that case, have compelled him to carry such deed into execution. If that be so, then this question will arise:— would its connection with an exercise of the power of appointment for charging the estate make it void? It must, I think, be held to be established by the cases, and particularly by *Daubeny* v. *Cockburn* (*a*), which I consider accurately to expound the existing law on the subject, that the appointment, being partly for a purpose beneficial to the donee of the power, was a fraud on the power, and that in consequence the whole appointment was bad. But if the deed of *July*, 1841, were to be regarded in the way I have suggested, namely, as a declaration of trust, by the eldest son, in pursuance of an arrangement between him and his father, and wholly apart from the raising money on the estate, and that in consideration of this arrangement the father has not

(*a*) 1 *Mer.* 643.

not exercised the power of appointment vested in him, it would be difficult to see how it could be made invalid by the fact of its being made contemporaneously with, although distinct from, other transactions, which are themselves bad.

Assume that the deed of *July*, 1841, had recited, that doubts were entertained whether the deed of *February*, 1841, was or was not void as being a fraud on the power, and that if it was so, the settled property would go as in default of appointment, and the father, in that event, not wishing to make a fresh appointment, but trusting to his son, had, in consequence of his executing the deed in question, agreed with his son, and determined not to attempt to make any further exercise of the power of appointment vested in him by the deed of *April*, 1816; could it, in that case, have been successfully contended, that the mere fact of the void appointment being simultaneous with this deed, (even if such had been the case,) would necessarily avoid the whole transaction? I think it impossible to carry the argument to that extent.

Then this question arises:—whether, in the events I have suggested, the deed of *July*, 1841, would not be good, although all the previous deeds were void? and whether, upon the evidence of the whole transaction, taken together, and looking at the accompanying memorandum and the will of the testator, such suggested case is not a correct statement of the real transaction?

It is true that the deed of *July*, 1841, bears date only two months after the execution of the mortgage deeds, and only five after the exercise and execution of the power of appointment; but does this alter the real nature of the transaction? Would it have been in any way

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way different, if the deed of the 19th *July*, 1841, had been executed ten or twelve years later, supposing the father had lived so long? I think not, and in my opinion that cannot affect the question or render the transaction invalid if it were originally valid.

It is material, therefore, to consider the way in which the two deeds are dependent upon and connected with each other. If they are distinct transactions, the circumstance of their being connected in date is immaterial. To some extent it is undoubtedly true that they are united in substance, because the deed of the 19th of *July*, 1841, proceeds on the assumption that the appointment of *February*, 1841, is a valid exercise of the power. But in order to consider whether the connections between those deeds taints the latter with the invalidity of the former, it is necessary to consider whether the execution of the former was essential for the execution of the latter, or whether the latter deed might not have been executed without any exercise of the power of appointment at all.

If the exercise of the power of appointment was essential to give validity to the deed of *July*, 1841, then the failure of the appointment destroys the effect of the subsequent deed, but if the exercise of the power of appointment was a mere accidental accessary, then the deed of *July*, 1841, must stand or fall on its own merits. What I have therefore to look at is the real effect of the deed of *July*, 1841, and whether the effect of it be or be not the settlement of estates coming to the son upon their being vested in him in possession, whether under the deed of appointment or in default of any appointment at all? and if this be the true effect and character of the deed, it does not, in my opinion, fail in a Court of Equity by reason of the invalidity of the exercise of the

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the power of appointment. The deed is made between the father of the first part, the eldest son of the second, the four younger children of the marriage of the third part, and *William Fraser* (the trustee) of the fourth part. The deed recites the exercise of the power of appointment, it recites the mortgage deeds, and all the previous incumbrances on the estate, but the recitals, which are expressive of the purpose and object for which the deed was executed, and which come immediately before the operative part, seem to me to be independent of the exercise of the power of appointment, and irrespective of the purposes for which that appointment was made. They are to this effect:—that *William Buckley Pugh* joined in the indenture of mortgage of *May*, 1841, on an agreement that he should be indemnified out of the real and personal property of *William Pugh*, and that the indemnity should be provided for as hereinafter mentioned. The next recital is, that the equity of redemption is vested in *William Pugh* for life, and on his death in *William Buckley Pugh*, for an absolute estate in fee simple. That would be so either under the power of appointment or in default of appointment, if that were the arrangement between the father and the son. It then recites, that there are four children of the marriage besides the eldest, and then comes the operative part of the deed, which makes all the real and personal estate, in the first instance, an indemnity to the son, and then directs them to be sold and the money to be equally divided among the children. The provision for the younger children of *William Pugh* is quite distinct from the indemnity given to *William Buckley Pugh*, and the object of the deed seems to me to be, after providing for the indemnity of the eldest son, to secure a provision for all the children out of the settled estates. I think it impossible to say that this provision is *ipso facto* void, because the interest of the

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eldest son in the estate at that time arose under what I assume to be an invalid appointment. The recital seems to point to a settlement of the remainder in fee in the estate vested in the eldest son, but the provisions in the deed might be held binding on him, whether this remainder in fee became vested in him either by virtue of the execution of the power of appointment, or in default of appointment.

The question before me is, whether the reversion in fee, being vested in the son (although not by the means which he and his father then believed), either by the act of the father or by his abstinence from doing an act to prevent it, this declaration of trust is not to take effect at all?

Suppose the father had, by his will, stated this deed and the arrangement between the son and himself, and that in consequence thereof, he had appointed the estates to his son in fee, could it be contended that the son would not be bound by the provisions of this deed? Suppose, instead of making such an appointment, he had referred, in the same manner, to the arrangement between the son and himself, and in order to carry it into effect had expressed his intention not to execute the power of appointment in favour of his son, and had allowed the estate to go to his son as in default of appointment, would that mode have varied the case? The question is, whether the last suggested case is not the real truth of the transaction, and whether the fact of the simultaneous dates of the deed, memorandum and will do not establish this proposition?

But, in my opinion, it is not necessary for me to decide that question at present. The question before me is, whether the deed is *ipso facto*, upon the face of it

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and with the surrounding circumstances, void, because if it be not, so long as it stands, the *cestuis que trust* under it are entitled to call on this Court to carry its provisions into effect for their benefit, they being in no respect tainted with any conduct which can disqualify them from receiving any benefit intended to be secured to them by its provisions. My opinion is, that it is not void on the face of it, and that until this deed has been declared to be void, and ordered to be delivered up to be cancelled, this Court must act on its provisions.

I also think that a declaration of the invalidity of the deed could only, if at all, be made in a suit regularly instituted for that purpose by *William Buckley Pugh*; and that, even if it were my opinion that in a suit properly instituted for that purpose such a decree would be made, it would not be competent to this Court to make such a decree or order on behalf of a Defendant in the present suit.

Another question was raised at the hearing on the construction of this deed, which, it was contended, prevented the Plaintiff from having any interest under it; the argument being, that the first witnessing part, properly understood, excluded the interest of the Plaintiffs, and confined it to an indemnity to *William Buckley Pugh*, who was to receive the whole of the money to be produced from the sale of the property, and if so understood, it must shew that the recital did not properly represent the object of the deed, which must receive a more limited effect. But I disposed of this at the hearing. I do not think the operative parts of the deed have the limited effect suggested. I think the recital and the operative part agree, and that both point to the same result, viz., to the indemnity of the son, and subject thereto, to the sale of the settled property and the

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division of the produce of it amongst the children of the marriage: that is, subject to the mortgages, if the appointment is good, but if the mortgages fail, either wholly or partially, it will simply go to increase the residue divisible among the children.

Upon the whole, I think the Plaintiffs are entitled to a decree for an account, on the footing of the deed of *July*, 1841, being a valid and subsisting deed; but, for the reasons on which my judgment is founded, I do not propose to make the declaration asked for in the first paragraph of the prayer of the bill, though the account will be directed on the same footing as if such declaration had been made; neither do I propose to introduce any words into the decree expressing that it is to be without prejudice to the Defendant *William Buckley Pugh* filing any bill he may be advised, to set aside the deed of *July*, 1841, but I mean to express my intention that this decree should be so framed as to prevent its being pleaded in bar of any such suit, in case any such suit should be instituted.

As the other Defendants have disclaimed all interest, the bill must be dismissed against them, but without costs, for on the face of the deed it was impossible not to make them parties.

TILLETT *v.* THE CHARING CROSS BRIDGE COMPANY.

March 16, 17.

A contract for the sale of land provided, that one party was to be consulted on any houses proposed to be built thereon by the other, and in case of difference, that *A.* and *B.*, or their nominees, should have power to decide any such question. There having been no decision, *held*, that this Court could not specifically perform the contract.

TILLETT was entitled to certain leaseholds for the residue of a term of ninety-nine years, which the Defendants required for the purpose of improving the approaches to the *Charing Cross Bridge* on the *Surrey* side thereof. The company, being empowered by their act (*a*), gave *Tillett* the usual notice to treat for the purchase of the lands required, whereupon the parties came to an agreement, which was signed by their respective agents, containing (amongst others which are immaterial) the following provisions:—

"Memorandum of heads of agreement arranged by *Charles Lee*, on behalf of the *Charing Cross Bridge* Company, and *Richard Augustus Withall* on behalf of Messrs. *Tillett*, *July* 4th, 1853.

"The company to pay to Messrs. *Tillett* the sum of 5,500*l.*, which entitles them to pull down, for the purpose of making the street shewn by the white strip on the plan, the houses or buildings indicated by the following numbers, viz.—Nos. 3, 4, 5, 6, 7½, 30, 31, 32, 33, 44, 45, 46, 53, 54, 55, 56, 59½.

"The old materials of the said houses, &c. so to be pulled down to be the company's.

"The company to convey to Messrs. *Tillett* the freehold of the ground shewn on the plan by a red colour.

"Messrs.

(*a*) 12 & 13 *Vict. c.* 51.

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"Messrs. *Tillett* to continue liable for the full rent now payable by them to the Archbishop, without any deduction or apportionment in respect of this transaction.

"As to the houses which Messrs. *Tillett* may build on the frontage of the new street, it is understood that both the company and themselves are greatly and mutually interested in the character of the street, as a respectable and attractive public thoroughfare, *and the company is to be consulted on any houses proposed by Messrs. Tillett, and in case of difference between the parties on this point, Messrs. Charles Lee and Richard Withall or their nominee shall have power absolutely to define and decide any such question.*

"The above are the terms agreed by us on behalf of our respective principals.

"*Charles Lee.*

"*Richard Augustus Withall.*"

This was a suit for the specific performance of the above contract, or if the Court "should not think fit so to order, then that the contract might be rescinded, and that the company might make proper compensation and satisfaction to the Plaintiffs for the injury which had been sustained by them as aforesaid."

Mr. *Lloyd* and Mr. *De Gex* for the Plaintiff, argued that the Court might decree the performance of this agreement. That the Plaintiffs might waive any term in it which was for their benefit, and thus remove any objections as to uncertainty. That as to the houses to be built, the arbitrators might agree, and if they could not arrange on a plan none would be built, but that this would not prevent the performance of the contract.

Lastly,

Lastly, that the notice to treat was of itself a sufficient contract. They cited *Marquis of Salisbury* v. *Great Northern Railway Company* (*a*); *The Regent's Canal Company* v. *Ware* (*b*); *Hawkes* v. *Eastern Counties Railway Company* (*c*); *Inge* v. *The Birmingham, &c. Railway Company* (*d*).

Mr. *Baggallay*, for the Defendant. First, if this be a concluded agreement, it is of such a nature that this Court cannot decree its specific performance. The distinction between this case and *Hawkes* v. *The Eastern Counties Railway* is, that there the bill was filed before the expiration of the parliamentary powers, the contrary is the case here. The Court, before making a decree, will see that it has the power to enforce the performance of the whole contract. Here, in regard to the houses to be built in the new street, it is plainly impossible, for "the company is to be consulted on any houses proposed by Messrs. *Tillett*," this is perfectly vague; "and in case of difference Messrs. *Lee* & *Withall* (or their nominee) are to have power absolutely to define and decide any such question." The Court has no means of compelling the arbitrators to decide or to appoint an umpire, nor can it cause the umpire to act, and yet the contract precludes a decision in any other way. Where there is a contract to sell at a valuation to be made by *A.*, the Court will specifically perform it, if the price has been settled, but while it is left undetermined, the Court will not interfere, for *non constat* that *A.* will ever act. The case of *Darbey* v. *Whitaker* (*e*) is precisely in point.

Secondly, this is not a concluded binding agreement between the parties, but a mere preliminary memorandum

(*a*) 17 *Q. B.* 840.
(*b*) 23 *Beav.* 575.
(*c*) 1 *De G., M. & G.* 752; & 5 *H. of L. Cas.* 331.
(*d*) 3 *De G., M. & G.* 658.
(*e*) 4 *Drewry*, 134.

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dum intended to lead to a future perfect agreement. He cited *Collier* v. *Mason* (*a*); *Collins* v. *Collins* (*b*).

Mr. *Lloyd* in reply.

The MASTER *of the* ROLLS.

March 17. Although, upon reading the evidence, I think that it was intended by the parties on both sides to do something more to make the matter more formal and regular, still I think that the memorandum of the 4th of *July*, 1853, was a concluded agreement. There are many cases in which this Court has enforced the performance of contracts in this preliminary form, and where the terms were to be afterwards expanded and embodied into a more perfect agreement by the solicitor, on instructions for that purpose. I think that this was a concluded agreement, and that, if there was no other objection to it, this Court would enforce it.

The question then turns on the effect of the agreement itself, and two objections were taken to it, one was, that the statutory powers of the company had expired, and the other rested on the terms of the agreement itself.

With respect to the expiration of the powers of the company, I should have wished to have looked more fully into it before expressing my opinion on the subject, because I am not at all clear that the distinction which Mr. *Baggallay* tried to press on me, and which depends on whether the powers were gone at the time the bill is filed, is one that can be supported. *Primâ facie,*

(*a*) 25 *Beav.* 200. (*b*) *Antè*, 306.

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facie, the rights and liabilities to be enforced now would depend on what they were at the time the agreement was entered into. It is, however, unnecessary to go into that point more fully, because, on looking at the terms of the agreement itself, I am of opinion that there is too much uncertainty in it to enable the Court to carry it into effect. There are several elements of uncertainty in it, but I only intend to refer to one, which was principally urged before me, and is that which relates to the houses to be built on the frontage of the new street. I concur in the observation, that the sort of houses to be erected was an essential part of the contract, and that it was intended that they should be of a character and description to be settled by Mr. *Lee* on the one side, and by Mr. *Withall* on the other, or by their nominee if they differed.

Before the bill was filed they had settled nothing, and at one time I entertained some doubt whether this Court would refuse specific performance in a case where the persons on whose determination the matter was to depend, being distinctly named, it was not shewn either that they could not perform or that they had repudiated the duties entrusted to them.

I had then present in my mind a case which I have since referred to. It is *Gregory* v. *Mighell* (*a*), which, under the circumstance which occurred, was certainly a strong decision. It was a parol agreement for a lease for twenty-one years, "at a fair and just annual rent to be fixed and ascertained by two indifferent persons, the one to be chosen by the Plaintiff, the other by the Defendant, with liberty to the arbitrators, in case of their differing, to choose one or more umpires." Certainly, nothing

(*a*) 18 *Ves.* 328.

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nothing could be more vague. The tenant was put in possession and remained in possession eight years, and had made an expenditure on the land, and the Master of the Rolls decreed a specific performance of that agreement. He said, that the tenant had no other title to possess the land, and therefore his possession was *primâ facie* to be referred to the agreement, and he then accounted for the nonpayment of rent, by the circumstance, that the rent was not fixed in the manner stipulated. He then says, "after it was known that the arbitrators had not fixed any rent, and that none of the other means, provided by the agreement, were resorted to, the Defendant still acquiesced in the Plaintiff retaining possession of these lands. That is a case in which the failure of the arbitrators to fix the rent can never affect the agreement. It is in part performed, and the Court must find some means of completing its execution, as, I have already said, the Plaintiff is not to be considered as a trespasser. Some rent he must pay; the amount must be fixed in some other mode, and it seems to me, that it should be ascertained by the Master without sending it to another arbitration, which might possibly end in the same way. A specific execution of this agreement must therefore be decreed, the Master to ascertain what, in 1799, would have been the fair rent of these premises, upon a lease for twenty-one years from that year." Now that certainly did appear to me at first to have a strong bearing on the present case, but it was a peculiar case, and much stress was laid on the fact of eight years' possession, which does not occur here.

In *Milnes* v. *Gery* (*a*), Sir *William Grant* also fully considered this subject. It was an agreement for sale according to the valuation of two persons, one of whom was

(*a*) 14 *Ves.* 407.

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was to be chosen by each side, or by an umpire appointed by the two, in case of disagreement. They differed in their estimate, and were not able to agree upon a third person, and it was decided, that the agreement could not be specifically enforced. The observations of Sir *William Grant* are these (*a*):—"The more I have considered this case, the more I am satisfied, that, independently of all other objections, there is no such agreement between the parties as can be carried into execution. The only agreement into which the Defendant entered was to purchase at a price to be ascertained in a specified mode. No price having ever been fixed in that mode, the parties have not agreed upon any price. Where, then, is the complete and concluded contract, which the Court is called upon to execute? The price is of the essence of a contract of sale. In this instance, the parties have agreed upon a particular mode of ascertaining the price. The agreement, that the price shall be fixed in one specific manner, certainly does not afford an inference that it is wholly indifferent in what manner it is to be fixed. The Court, declaring that the one shall take, and the other shall give a price fixed in any other manner, does not execute any agreement of theirs, but makes an agreement for them, upon a notion that it may be as disadvantageous as that which they made for themselves. How can a man be forced to transfer to a stranger that confidence which, upon a subject materially interesting to him, he has reposed in an individual of his own selection?" He afterwards says, that "an agreement to sell at a fair valuation is essentially different; in that case, no particular means of ascertaining the value are pointed out. There is nothing, therefore, precluding the Court from adopting any means adapted to that purpose." It is upon that principle,

(*a*) 14 *Ves.* 406.

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principle, undoubtedly, that the case of *Gregory* v. *Mighell* (*a*) may be sustained and supported.

Now here, undoubtedly, this is not a case of price, but the question is the same, if the mode in which the houses are to be built is an essential part of the contract; and I think it is.

In the cases I referred to, it was proved that the price or the rent could not be ascertained in the way the parties had contemplated. Here, it is not proved that the form in which these houses might be built could not be carried into effect in the mode contemplated, because there is nothing to shew that when the time arrives for building them, these two gentlemen might not agree on the character of the houses or on the appointment of a nominee. But Mr. *Baggallay* put an argument to me which I think is unanswerable upon that subject, viz. that this Court cannot decree the specific performance of a contract which it does not see its way to enforce eventually; and if it should turn out hereafter that these persons will not fix the character of the houses, and will have nothing to do with it, then the result will be, that the Court ought not to have decreed a specific performance, and it ought not now to make such a decree hypothetically on an event which may or may not happen hereafter. To illustrate that, Mr. *Baggallay* cited to me a case of *Darbey* v. *Whitaker* (*b*), which is decisive on this point, and which I think I am bound to follow, for it is identically the same as this. There, the price was to be fixed by two named persons or their umpire; and on those very words, the Vice-Chancellor *Kindersley* held, that it was not an agreement which this Court could specifically enforce.

I am

(*a*) 18 *Ves.* 328. (*b*) 4 *Drew.* 134.

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I am of opinion, therefore, that the terms of this agreement are too vague to be enforced, and that it is impossible for me to make a decree for specific performance.

I must dismiss the bill without costs.

CAILLAUD'S PATENT TANNING COMPANY (LIMITED) *v.* JEAN CAILLAUD.

Jan. 11.

A motion, under the 20 & 21 *Vict.* c. 14, s. 24, that a limited liability company might give security for costs, on an affidavit that the company had ceased all operations, that proceedings had been taken to wind it up, that the plant had been sold, and that the company was "insolvent and unable to pay its debts already incurred," refused, the Court not feeling satisfied that the assets of the company would be insufficient to pay the Defendant's costs.

THE Defendant moved, under the 20 & 21 *Vict.* c. 14, s. 24, that the Plaintiffs might be ordered to give to the Defendant security for the costs of this suit, and that in the meantime, all further proceedings in this cause might be stayed.

By this section it is enacted, "where a limited company is plaintiff or pursuer in any action, suit or other legal proceeding, any judge having jurisdiction in the matter may, if it be proved to his satisfaction, that there is reason to believe that if the defendant be successful in his defence, *the assets of the company will be insufficient to pay his costs*, require sufficient security to be given for such costs, and may stay all proceedings until such security be given."

The Defendant made the following affidavit:—

"1. That the above-named Plaintiffs are a company incorporated under the provisions of the Joint Stock Companies' Acts, 1856 and 1857, with limited liability. All the shares of the said company have been fully paid up by all the shareholders therein, except *Ephraim Sabel*,

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Sabel, who has been duly adjudged bankrupt. The said company has entirely ceased to carry on all mercantile operations for several months past, the whole of the stock and plant has been sold off, and proceedings have been taken to wind up the said company. *The said company is insolvent and unable to pay its debts already incurred*, and if I am successful in my defence to this suit, the assets of the said company will be insufficient to pay my costs. I verily believe I have a good defence to this suit on the merits. I am able to depose to the above facts from my knowledge of the affairs of the company, acquired as a director and manufacturing manager of the company."

Mr. *T. Hughes*, in support of the motion, contended that a sufficient case had been made out for ordering the Plaintiffs to give security for costs.

Mr. *Cracknall*, *contrà*, was not heard.

The MASTER *of the* ROLLS.

I cannot make the order. I must be satisfied that the assets of the company will be insufficient to pay the Defendant's costs. Under the circumstances of this case I should have to try the cause, in order to satisfy myself that the assets of the company will be insufficient for that purpose.

NOTE.—A bond for 100*l.* is a "*sufficient security*" under this act; *The Australian Steam Ship Company* v. *Fleming*, 4 *Kay & J.* 407.

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WRIGHT *v.* WESTON.

March 11.

THE testatrix *Caroline Wright* was entitled to a legacy of 1,000*l.* under the will of her husband.

By her will dated in *January*, 1857, she expressed herself as follows :—" Whereas, under and by virtue of the last will and testament of my late husband *Charles Wright*, deceased, dated the 1st day of *August*, 1853, I am entitled to a legacy or sum of 1,000*l.*, now I do hereby give and bequeath the said legacy or sum of 1,000*l.* and all interest thereon to which I may be entitled at the time of my decease, or which may thereafter accrue due thereon, as follows, that is to say, *as to* 100*l.*, *part of the said legacy or sum of* 1,000*l.*, unto my dear sister *Matilda*, the wife of *Frederick Bean*; as to 400*l.*, further part of the said legacy or sum of 1,000*l.*, unto *Raymond Weston*; and as to all the residue of the said legacy or sum of 1,000*l.*, and all interest on the said legacy or sum of 1,000*l.* to which I may be entitled at the time of my decease, or which may thereafter accrue due thereon, and as to all the residue of my estate and effects, I give and bequeath the same to *Raymond Weston* and *Adam Burness*" on certain trusts for her children (the Plaintiffs).

A testatrix, after reciting that she was entitled to a legacy of 1,000*l.* under her husband's will, gave the 1,000*l.*, as to 100*l.*, part thereof, to *A.*, as to 400*l.*, part thereof, to *B.*, and as to all the residue of the said legacy of 1,000*l.* and all the residue of her estate, to *C.* At the death of the testatrix, 216*l.* only were due on the legacy. *Held*, that *A.*, *B.* and *C.* must abate in proportion.

The testatrix died in the following month.

Her only assets consisted of a sum of 216*l.* 14*s.* 6*d.*, the balance of the legacy of 1,000*l.* left to her by her husband (she having received 783*l.* 5*s.* 6*d.* in her life), and an arrear of interest on it.

In

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In taking the accounts, Mrs. *Bean* insisted, that the bequest to her of 100*l.* was specific, and that she was entitled to have it raised out of the 216*l.* 14*s.* 6*d.* in the first instance, in priority of the legacy of 400*l.* to *Weston*, and of the gift to the children. The point was reserved.

Mr. *Shebbeare*, for the Plaintiffs, the children of the testatrix, argued, that the 216*l.* 14*s.* 6*d.* was divisible between Mrs. *Bean*, Mr. *Weston* and the Plaintiffs, in proportion to their intended interests in the 1,000*l.* He relied on *Page* v. *Leapingwell* (*a*), as distinguished from *Petre* v. *Petre* (*b*).

Mr. *Pearson*, for Mr. *Weston*, contended, that the testatrix had given definite sums of 100*l.* and 400*l.* to the two legatees, and nothing but the "residue" to the children. That this was a case of a particular residue, and that it was rendered more clear by the gift of the general residue in the same sentence, and of the whole and not a portion of the interest.

Mr. *Henry F. Shebbeare*, for Mr. and Mrs. *Bean*. First, the legacies of 100*l.* and 400*l.* have both priority over the gift of the "residue." The word "residue" must be taken in its ordinary sense, as what remains after the prior payments have been made, and not in the sense of a proportionate share of the fund; *Vivian* v. *Mortlock* (*c*).

This case differs from *Page* v. *Leapingwell*, where the gift was of "the overplus money" out of a fund estimated at not less than 10,000*l.* and not of the "residue."

(*a*) 18 *Ves.* 463.
(*b*) 14 *Beav.* 197.
(*c*) 21 *Beav.* 252.

due." In that case the testator assumed he had a certain amount to dispose of; but here that was scarcely possible, for the testatrix's husband died four years before the date of her will, and there was every probability of her receiving the legacy, or a part of it, prior to her death, and this turned out to be the case.

Secondly. The legacy of 100*l.* has priority over that of 400*l.*, for it is a specific gift of a part; the second is given as "a further part," that is, after deduction of the first.

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I think this fund is apportionable amongst them all, and that *Page* v. *Leapingwell* applies to the construction of this will. The testatrix proposes to dispose of a specific sum of 1,000*l.*, which she gives and bequeaths "as follows, that is to say," as to 100*l.* to one person, as to 400*l.* to another, and as to all the residue to a third. *Page* v. *Leapingwell* exactly applies.

Nothing turns on the residue of the 1,000*l.* being coupled with the gift of the general residue: they must be taken separately.

I cannot treat this as a gift of a floating balance due in respect of the legacy of 1,000*l.* I treat it as a specific legacy of that sum, and that it has been adeemed, *pro tanto*, by payments to the testatrix in her lifetime. I am, therefore, of opinion that the children are entitled to a declaration that the fund must be apportioned rateably.

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REHDEN *v.* WESLEY.

March 22.

On a notice of motion for a decree, the Plaintiff had given notice to use the answers of some of the Defendants. *Held*, that he might cross-examine those Defendants on their answers, without prejudice to the right of the other Defendants to object to the cross-examination being used against them. But *held*, also, that the Plaintiff could not examine, in chief, other witnesses not mentioned in his notice of motion for a decree.

THIS suit was instituted by a legatee, against *Wesley* and *Alexander* (the executors), and against other persons interested under the will. The bill prayed for the administration of the trusts of the will, and sought to make the executors liable for wilful default.

On the 2nd of *March*, the Plaintiff gave notice of motion for a decree for the 4th of *April*, and specified that at the hearing of the motion, and in support thereof, she would read the answers of the executors, *Wesley* and *Alexander*.

On the 15th of *March*, the Plaintiff summoned the executors to attend at the Examiner's Office, on the 18th of *March*, to be cross-examined on their answers. The Plaintiff also subpœnaed other witnesses to be examined in chief, who were not referred to in the notice of motion for a decree.

The executors declined to be sworn, and the matter was thereupon referred into Court.

Mr. *Waller*, for the Plaintiff, cited *Wightman* v. *Wheelton* (*a*), and was stopped by the Court.

Mr. *Smythe* for *Wesley* and other Defendants. The Plaintiff has given notice, that she will use the answers in

(*a*) 23 *Beav.* 397.

in support of her motion for a decree. She has thereby made the answers her own evidence, and it is not competent for her to cross-examine witnesses whose answers she has elected to use on her own behalf. It is the same as if she had examined an independent witness in chief: she could not cross-examine him. *Kay* v. *Smith* (*a*) was overruled by *Manby* v. *Bewicke* (*b*).

On a motion for a decree, the answer of a Defendant may be read against him without notice; but the answer of one Defendant cannot be read against another Defendant without it; *Cousins* v. *Vasey* (*c*); it is therefore intended to use the answer of one Defendant as evidence against another Defendant, if so, the latter alone has the right of cross-examination.

Secondly. The Plaintiff proposes to examine witnesses in chief who are not referred to in the notice for a decree.

[*The* MASTER *of the* ROLLS. I think that wrong.]

Mr. *Surrage*, for *Alexander*. A party cannot cross-examine his own witness under the 15 & 16 *Vict.* c. 86, s. 40. Here, by the notice of motion, the Plaintiff says she will use the answers in support of her own motion, and she makes the Defendants her own witnesses. Where a Defendant finds that the only evidence to be read by the Plaintiff is the answer of a co-Defendant, he may not think it necessary to go into any further evidence. But if, after the fourteen days have expired, the Plaintiff cross-examines a Defendant, he may make out a different case against the other Defendants, who are

(*a*) 20 *Beav.* 566.
(*b*) 26 *Law J., Ch.* 20.
(*c*) 9 *Hare*, lxi.

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are not, by the General Orders, allowed to adduce any further evidence, and the Defendant would thus be taken by surprise. Such cannot be the intention, for the object of the notice was to tell the Defendant precisely what evidence he has to meet.

The MASTER *of the* ROLLS.

I am of opinion that the Plaintiff is at liberty to cross-examine the Defendants on their answers, without prejudice to the right of the other Defendants to object to the cross-examination being read against them.

This is clear, that if you intend to use the answer of one Defendant against another Defendant, the latter must have the right of cross-examination. It is also clear, that you may cross-examine against the parties who may use the answer, and the circumstance of notice having been given does not affect the right to cross-examine. I am of opinion, that the Plaintiff may cross-examine the Defendants on their answer, without prejudice to other Defendants objecting to the cross-examination being read against them. At the hearing I will dispose of that objection.

[Mr. *Waller*. Can the Plaintiff examine witnesses in chief.]

The MASTER *of the* ROLLS. Certainly not.

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GRIMES and Others on behalf, &c. *v.* HARRISON and Others.

March 17, 18, 19, 21.

Distinction between a Benefit Building Society and a Freehold Land Society.

A society whose rules are certified as a Benefit Building Society, under the 6 & 7 *Will.* 4, c. 32, is not justified in acting as a Freehold Land Society.

A rule of a Benefit Building Society directed that unemployed money should be invested "in such manner and upon such legal security" as the board of directors should deem necessary:—*Held*, that it might be invested in the purchase of freeholds.

THIS was a suit instituted by four members of "*The Prince of Wales Mutual Benefit Building Society*," on behalf of themselves and all the other members (except the Defendants), against the directors, the two trustees and Mr. *Syers*, to make them liable to replace 800*l.*, part of the society's moneys, paid to *Syers* for the purchase of a freehold property.

In 1853, the society was established as a Benefit Building Society, under the 6 & 7 *Will.* 4, c. 32, and rules were made, which, on the 4th of *October*, 1853, were duly certified by the barrister to be in conformity to law and with the provisions of the statute. Though termed a Building Society, it appeared that the intention really was to create a Freehold Land Society, for purchasing land and dividing it amongst its members; but to bring it within the regulations of the Building Societies Act, it was inrolled as a Building Society. Nothing appeared on the certified rules to shew that the intention was to act as a Freehold Land Society, but after the certificate had been obtained, the name of the society had

The directors of a Building Society had (as it was held) power to invest unemployed moneys in the purchase of freeholds. Having only 621*l.* in hand, they contracted for the purchase of an estate for 2,300*l.*, payable by instalments. In the treaty, they held themselves out as a Land Society, and they paid 800*l.* on account, in cheques signed, by their order, by the trustees, who were not directors:—*Held*, first, that the directors had committed a breach of trust, and were liable to replace the 800*l.*; secondly, that the vendor was under no liability; and, thirdly, that the trustees, who had only acted ministerially, under the directors, were not liable, notwithstanding there was some informality in the authority given to them by the directors.

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had been attempted to be changed, and the directors caused the members' pass-book, furnished to each member, to be issued with a title page in which the society was described as follows:—"*The North-West London Equitable Freehold Land Society, enrolled as the Prince of Wales Mutual Benefit Building Society.*" No alteration, however, had been made in the certified rules.

In *October*, 1854, two of the directors entered into a verbal contract with *Syers* for the purchase from him of a piece of freehold land for 2,300*l.* They paid him a deposit of 150*l.*, for which *Syers* gave a receipt in the following form:—

"*London*, 7th *October*, 1854. Received from the directors of the *North London Freehold Society*, by the hand of Mr. *Haden*, the sum of 150*l.*, deposit on purchase of freehold land at *West Green, Tottenham.*"

Endorsed on the receipt was a memorandum as follows:—"I agree to take the payment as follows,—150*l.* already received, as per receipt annexed, 450*l.* within fourteen days of this date, 400*l.* on or before *Christmas-day*, 1854, and the remaining, being 1,300*l.*, by two equal instalments of 650*l.* each, on or before *Christmas-day*, 1855, and the remainder on or before *Christmas-day*, 1856. The respective amounts bearing interest at 5 per cent. per annum."

At the time this contract was entered into, the balance of cash belonging to the society was only 621*l.*

A board of directors, held on the 10th of *October*, ratified the agreement, and ordered the secretary to draw a cheque for 150*l.*, to repay the deposit. In consequence, the two trustees of the society (*Hardingham* and *Smith*) signed a cheque upon the bankers for the amount.

Further

Further instalments were paid to *Syers* by cheques signed by the two trustees, upon resolutions of the board of directors, but as the Plaintiff alleged, "although such resolutions were entered in the minute book of the said society, neither of them was verified by the signature of two directors." The bill alleged, that the trustees well knew and it appeared by the resolution, that the said sums "were to be applied in the purchase of land, which was a misappropriation of the funds of the society, and a breach of trust on the part of the trustees."

In the whole, 800*l.* had been thus paid out of the society's funds.

The Plaintiffs insisted, that this transaction was contrary to the rules of the society, and a breach of trust on the part of the directors and trustees, and that they were bound to make good the 800*l.*; that *Syers* and the trustees were cognizant of the breach of trust, and were also liable.

The bill, in addition, alleged that the purchase was fraudulent and collusive, and at an excessive price. The nature, however, of the decision renders it unnecessary to advert to the very suspicious circumstances under which the purchase had been entered into.

It is necessary now to refer to those rules of the society which were principally relied on at the hearing; they were as follows:—

"I. The objects of this society shall be to raise a fund, by weekly subscriptions of the members, in shares of 25*l.* each, out of which each member may receive the amount or value of his share, *for the erection or purchase of a dwelling-house or dwelling-houses, or other real or leasehold estate*, pursuant to 6 & 7 *Will.* 4, c. 32."

"XII. Whenever

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"XII. Whenever the money in hand shall, in the opinion of the directors, be sufficient for the purpose, it shall be employed in advancing to those members, whose subscriptions are not in arrear, the amount of their shares." It then provided for the order in which the members were to become entitled to an advance, and proceeded:—"And all money not so employed shall be invested by the trustees *in such manner, and upon such legal security*, as the board of directors shall deem necessary, in the names of the trustees for the time being," &c.

"XVII. All securities to, and investments on account of, the society shall be made in the names of the trustees for the time being."

"XXXI. The board shall have full power to conduct the affairs of the society, subject only to the rules thereof for the time being," &c.

"XXXV. No payment above 5*l.* shall be made out of the funds of the society except by a cheque on the bankers, which cheque must be signed by two of the trustees and countersigned by the secretary; no such cheque shall be signed by any trustee, except upon the direction of the board of directors, such direction to be entered in the minute book of the society, *and verified by the signature of two directors*, at least, not being themselves trustees."

"XXXIX. No director, trustee or other officer of this society shall be responsible for or liable to make good any deficiency that may arise in the funds, property or effects of the society, otherwise than by reason of his wilful neglect or default, nor for the default or defalcation of any other officer, but every such director, trustee or other officer shall be answerable for the money, property and effects actually received by him

on

on account of the society, *until he shall have disposed of the same in accordance with these rules*, when his whole liability in that respect shall cease."

Mr. *R. Palmer* and Mr. *Southgate*, for the Plaintiffs. First. The directors have committed a breach of trust, and are liable to replace the 800*l.* This was a Building Society, and certified as such, the rules were binding, and could not be altered, except in the way pointed out by the act. These rules gave no authority to invest the moneys of the society in the purchase of lands, and if they did give any such authority, it only extended to the surplus in hand, and they did not warrant a speculation in land to the extent of 2,300*l.*, an amount far exceeding the existing assets of the society. It will be said, that the transaction was sanctioned by the members and by the general meetings, but it was not a matter within the powers of the members or of a general meeting; *Morgan's Case* (*a*); nor was it for that purpose that any meeting was convened.

Secondly. The trustees who signed the cheques are also liable, for they were not authorized in the manner required by the rules. The trustees have not "disposed of the same, in accordance with the rules," so as to entitle them to an indemnity under the 39th rule. Again, if they saw the resolutions under which they acted (which it must be assumed they did, as they were their only authority), they must have observed that the trust funds were being misapplied. They have aided in the misapplication, and are therefore responsible for the breach of trust in which they have participated.

Thirdly.

(*a*) 1 *Mac. & Gor.* 225.

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Thirdly. *Syers* is liable to refund the money received by him under this contract, for it is void, as involving a breach of trust, of which he must have been cognizant.

Mr. *Selwyn* and Mr. *W. Morris* for *Harrison*, *Haden* and *Roberts* (three Directors). The directors have acted in conformity with the real objects of the society, and have committed no breach of trust. The object of the establishment of the association is distinctly stated in the prospectus to be "for the purpose of purchasing freehold lands, and subdividing them at the wholesale price," and the first rule states the object to be, to obtain houses and real estate for every member. This was a proper and lawful mode of effecting the object, and if the funds were temporarily insufficient, the 26th rule enabled the directors to borrow the necessary funds to enable them to complete the purchase. There was nothing unlawful in this transaction, for if two persons could lawfully agree to purchase an estate and then divide it, so could fifty or any number, and it required no legislative powers to enable them to do so. Here, all the members knew, from the pass-books and the other documents, that this was to be a Land as well as a Building Society, and all the members acquiesced in what was done, both individually and at the general meetings; they cannot, therefore, object to it. Lastly, these disputes ought to be determined by arbitration, under the rule of the society to that effect; *Armitage* v. *Walker* (*a*).

They also referred to 10 *Geo.* 4, c. 56, s. 27; 18 & 19 *Vict.* c. 63.

Mr. *Follett* and Mr. *Cracknall*, for the trustees, argued, that they were mere officers, bound to obey the direction

(*a*) 2 *Kay & J.* 211.

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direction of the board of directors, having no authority to interfere in, or exercise any control over, the affairs of the society or the acts of the board of directors; that the objects and intentions of every member were the same, namely, to buy land out of their subscriptions. Lastly, that the Plaintiffs could not sue on behalf of all the other members, for some had concurred and acquiesced in the acts complained of by the bill; *Kent* v. *Jackson* (*a*); *Williams* v. *Salmond* (*b*).

Mr. *Lloyd* and Mr. *C. C. Barber*, for Mr. *Syers*, argued, that he had been dealing at arm's length with a society which professed to be a Building Society, and which would then be acting within its powers; that he had no means of inspecting, and under no obligation to inspect, the rules of the society.

But secondly, that under the 12th rule, the directors had power to buy land for the society, as had been decided both in *Mullock* v. *Jenkins* (*c*), and *Cutbill* v. *Kingdom* (*d*). That the contract was, at all events, valid as regarded *Syers*, who was under no liability to the Plaintiffs.

Mr. *Southgate* in reply. The trust moneys are traced into the hands of *Syers*, and persons taking trust moneys from directors have notice of their powers; *Bryson* v. *The Warwick, &c. Canal Company* (*e*).

The MASTER *of the* ROLLS.

March 19.

The view I take of this case is this:—there is in my opinion a great distinction between a Freehold Land Society and a Benefit Building Society. A Freehold Land Society buys land with the funds contributed by the

(*a*) 14 *Beav.* 367.
(*b*) 2 *Kay & J.* 463.
(*c*) 14 *Beav.* 628.
(*d*) 1 *Exch. Rep.* 494.
(*e*) 4 *De G., M. & G.* 711.

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the members of the society, and then divides it amongst them; but a Benefit Building Society advances to its borrowing members money derived from the subscriptions, and which the borrowing members themselves lay out in the purchase of lands or buildings, and then mortgage them to the society. But this is quite clear, that in both cases, the members must be bound by the rules constituting the society, to which they have become parties and upon which they have acted, and I am of opinion, that it does not lie in the mouth of any member of the company to say, that the book of rules, certified by the barrister, does not contain the rules by which they are to be bound. I find not only a rule that every member shall be furnished with a pass-book containing his account and the rules, but an express rule, the 31st, "that the board shall have full power to conduct the affairs of the society, subject only to the rules thereof for the time being." Therefore the rules of the society bind all its members.

I cannot accede to the doctrine, that as between members of the society, the fact of putting on the pass-books the title "Freehold Land Society," or adding a title page, which calls it a "Freehold Land Society,' will alter the rules, and convert them into something other than what they appear to be upon the face of them. I expressly make the distinction between the members of the society and strangers, because in that respect I think that Mr. *Syers'* case is a very distinct one from that of the members of the society, and I will explain the distinction presently. It appears in evidence, that Mr. *Tidd Pratt's* certificate was obtained upon a copy of the rules given to him, without any intimation whatever that the words "Freehold Land Society" constituted the title of the company, or that it was intended in any respect to be "a Freehold Land Society."

Society." And it is expressly sworn, in one of the answers, that this was done purposely, in consequence of its being known that if the society had been called "a Freehold Land Society," Mr. *Tidd Pratt* would not have certified it to be within the provisions of the 6 & 7 *Will.* 4, c. 32, s. 26, and that he would only have certified these rules as those of a Benefit Building Society. It is impossible, therefore, for me to adopt the view pressed upon me, that the Court would mould these rules in order to make them relate to a Freehold Land Society, when I find that, by the express suppression of the fact that this was, or was intended to be, a Freehold Land Society, this society has obtained, from the officer appointed by the legislature for this purpose, the advantage to be derived from the fact of their being a Benefit Building Society, and obtained this solely because they were not known and not believed to be a Freehold Land Society. They have themselves submitted their rules to the officer appointed by the legislature for that purpose, and they have obtained a certificate which has enabled them to enjoy the advantages conferred upon "a Benefit Building Society," as distinct from a "Freehold Land Society," and solely upon the condition that they were not a Freehold Land Society, which fact they suppressed in applying for a certificate of these rules. It is, therefore, impossible for me to modify these rules, and to say that I am to incorporate into them the fact, that this is "a Freehold Land Society," and that I am to read and translate the rules with that species of comment upon them, or, if I may say so, with that infusion into them, for the purpose of making them meet the case of a Freehold Land Society: on the contrary, I think, if it is to have any effect, it would have an effect the opposite way. But I am of opinion that the rules alone must determine what were the functions, duties and powers

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powers of the directors of the society, and I find by the 31st rule that the directors are to manage the affairs in accordance with the rules of the society.

The first rule (*a*) was strongly insisted on in favor of the Defendants, and this, it is said, gives the company power to purchase land as they think fit. But it is clear, upon reading the rule and considering the society as a Benefit Building Society, that it does not confer any such power at all. The obvious meaning of it is, that each member is to receive the amount of his share for the erection of a dwelling-house or the purchase of a dwelling-house, or the purchase of other real or lease-hold estate, pursuant to the 6 & 7 *Will.* 4, c. 32. That rule gives no authority to the directors to purchase land and divide it among the members of the company, and there is nothing in these rules which authorizes it. The 12th clause, no doubt, allows them to invest money in land, and that is perfectly consistent with the case of *Cutbill* v. *Kingdom* (*b*) and *Mullock* v. *Jenkins* (*c*), because the clause directs the money in hand to be advanced to the members, and "that all money not so employed shall be invested by the trustees in such manner and upon such legal security as the board of directors shall deem necessary." I am of opinion, and I state it because it is so far in favor of the Defendants, that this includes land, and that the directors have authority and power to invest money, which is in the hands of the trustees, and not required for the purpose of loans to members, in the purchase of land, by way of investment of the funds of the society.

The argument of the Defendants is this:—That at this time nobody applied for loans, and that there was then a sum of 62*l.* in hand. Well, if this rule gave them authority to do anything, it was simply to invest 62*l.* in

(*a*) *Ante, p.* 437. (*b*) 1 *Exch.* 494. (*c*) 14 *Beav.* 628.

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in the purchase of land: it could hardly, however, be treated as money not required, for if anybody came for a loan, the directors would be bound to advance it, and, acting prudently, they could not be said to have had a sufficient sum for the purpose of making proper loans and, in addition to this, a surplus to invest.

But the contract entered into was not for an investment of 621*l.*, but for laying out and incurring liabilities to the extent of 2,300*l.* They actually made the society liable for 2,300*l.* under a clause which only authorizes them to invest, in case they have surplus money not required for the purpose of loans to the members, every one of whom was entitled, out of any money in hand, to a loan to the amount of his share. It is, under the pretence of investing the surplus money, that the directors make the society liable to the amount of 2,300*l.* By what possibility can that be held to be a valid and proper discharge of their duties by the directors of this society? By the contract in *October*, 1854, 150*l.* was to be paid down, and 450*l.* within fourteen days, that is 600*l.* out of 621*l.* at the bankers. Then 400*l.* was to be paid at *Christmas-day*, on which day, according to the ordinary rate of subscription, they would not have that amount in hand, and if the business and objects of the society were carried into effect, there would be no balance whatever in hand to pay the 400*l.*, and, in addition to this, there would still remain a sum of 1,300*l.* to be paid by two equal instalments. In my opinion, it is impossible to say, upon the rules, that this was a *bonâ fide* investment of a surplus fund of the society. It was, in point of fact, nothing more than a speculative investment of the money of the society in the purchase of an estate to be divided amongst the members. That may be one of the functions of a *Freehold Land Society*, but I am of opinion that it is not

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not one of the functions of a *Benefit Building Society*. I think that it is not within these rules, by which the members are bound, and in conformity with which alone the directors could act; and that every member of the society is entitled to say to the directors, "You shall not go beyond these rules." I think that the fact of its being called a *Freehold Land Society*, or of the pass-book being headed as an account of a *Freehold Land Society*, or of the minutes of the directors being kept as a *Freehold Land Society*, does not entitle the directors to act contrary to the rules by which they are bound, or preclude any member from objecting to their acting in disobedience of them.

The consequence of this is, that I am of opinion that this was a breach of trust, and that the directors had no authority to lay out the money of the society in this contract.

Observe what the consequences would be of my holding that this contract bound the society. Mr. *Syers* might file a bill for the specific performance of the contract. How is he to get paid his purchase-money? Is each member liable to contribute or liable to pay the whole amount? Upon these rules I think they are none liable, and that they are at liberty to say,—"those were not the conditions and terms upon which we joined the society." In the same way, I think that they are entitled to say that the directors have exceeded their authority, and that, by entering into this contract, they have acted beyond the scope of the trust delegated to them. The consequence is, that all the directors who authorized the payment of the money must be held liable to repay the amount, for they have misapplied trust money.

With respect to the trustees, I do not see anything to affect

affect them personally. They are not directors, and have nothing to do with ordering the purchase to be made. They are mere ministerial officers, holding the money, which they are bound to dispose of as the directors should direct.

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[Mr. *Southgate* referred to the 17th and 35th rules, which were read.]

The MASTER *of the* ROLLS :—As I stopped Mr. *Follett* on the point, if anything further is to be said about it, I must allow the matter to be mentioned again.

What I intend to do with respect to the trustees is this :—I think they acted ministerially, and simply under the direction of the directors. I do not consider that they had anything to do in the conduct of the matter, and therefore there ought to be no direction on them to replace the money; all I could do would be to give them no costs.

With respect to Mr. *Syers*, I do not see what case the company has against him. He was dealing with what he supposed to be a Freehold Land Society, for they call themselves so, and such societies, I assume, have power to buy land, and divide it among their members. He was not bound to look at the rules of the Freehold Land Society, which ordinarily have powers to deal in matters of this description. He could not, without reading these rules, ascertain that this was not a Freehold Land Society, and that it was only entitled to act as a Benefit Building Society: dealing therefore *bonâ fide*, as he thought, with a Freehold Land Society, and simply selling land to it, at the request of the society, I see no reason whatever for saying that this is such a transaction as necessarily made him liable to return

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the money he has received. If the contract is invalid or set aside, the persons who have paid Mr. *Syers* and are made liable to recoup it to the company, may or may not be able to maintain an action at law against him to make him restore it; I express no opinion on that point, and I mean that the decree in this suit shall not fetter any proceeding which any of the parties may think fit to take against Mr. *Syers* for the purpose of making him restore the money already paid.

I think the bill must be dismissed against *Syers*, but without costs.

There must be a declaration that this was a breach of trust, and that the directors are liable to replace the money. The directors must pay the Plaintiffs' costs, assuming that to be asked; but no order will be made against the trustees, who will have no costs, unless the point is mentioned again.

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March 21. I have read the answers and the passages in the bill to which my attention was very carefully called, and I think that I came to a correct conclusion, and that the bill ought to be dismissed against the trustees without costs.

I will state shortly the reason why I have arrived at that conclusion. There is a clause shewing that they are bound to dispose of the company's money "in accordance with the rules." I think that merely means this:—that as they have no hand in the management of the society, they are to sign the cheques given by the persons who manage the society, only seeing that the proper forms are followed in that respect. The forms were not

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not entirely complied with; upon one occasion, at least, there was some error in that respect, but it is merely formal, because it is clear that the directors of the society really intended to make an order for the payment of the money. But the trustees do not rest their case upon that, they do not say "we were merely ministerial officers, we had nothing to do with the management, but as ministerial officers we simply did that which the directors directed us to do:" so far from it, they support and defend the case of the other Defendants, and say, that this is not a Building Society, but a Freehold Land Society. I am of opinion, therefore, that I cannot give them any costs, but I shall make no decree against them to replace the money.

COWLING *v.* COWLING.

March 12, 14.

Stock in the funds, in which the testator has a reversionary interest, will not pass by a bequest of "my goods and furniture, my plate and linen, all money and notes that may be due to me at my decease."

THE testator, Mr. *Cowling*, at the date of his will and at his death was entitled to a reversionary interest in one-third of two sums of 8,380*l.* Consols and 2,798*l.* reduced, expectant upon the death of *André Elisée Coutau*. These sums were standing in Court to the credit of a cause of *Norris* v. *Harrison*.

The testator made his will, dated 1835, which was in these words:—

"I bequeath unto my beloved wife, *Sarah Cowling*, my goods and furniture, my plate and linen, all moneys and notes that may be due to me at my decease. This is my will and testament. Given under my hand at *Greenwich* this 14th day of *March*, 1835."

The testator died in the same year.

André Elisée Coutau died in 1858, and the reversionary

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sionary interest then fell into possession. It was wholly claimed by *Sarah Cowling*, under the will; but the next of kin of the testator insisted, that it did not pass by the terms of the will, and that, as to this portion of the testator's property, there was an intestacy.

Mr. *R. Palmer* and Mr. *Berkeley* for the Plaintiff, one of the next of kin. If the stock passes, it must be under the word "goods" or "moneys." The effect of these words, in this will, depend on the context. If stock would pass by the word "money" or "goods," still, here there is the addition of "and notes," shewing that the testator did not intend to include everything by the words "the moneys." Again, the moneys are also limited to those "due to me at my decease." Secondly. The words are limited to things *ejusdem generis*.

Mr. *Cracknall* in the same interest.

Mr. *Cotton*, for the widow, argued that the words were sufficient to carry the stock, and that the authorities warranted that construction, which, it was apparent, was the real intention of the testator.

Mr. *R. Palmer* in reply.

The following cases were cited:—*Gosden* v. *Dotterill*(*a*); *Kendall* v. *Kendall*(*b*); *Hotham* v. *Sutton*(*c*); *Lowe* v. *Thomas*(*d*); *Waite* v. *Combes*(*e*); *Stocks* v. *Barré*(*f*); *Avison* v. *Simpson*(*g*); *Roper on Legacies*(*h*).

The

(*a*) 1 *Myl. & K.* 56.
(*b*) 4 *Russ.* 369.
(*c*) 15 *Ves.* 319.
(*d*) *Kay*, 369; 5 *De G., M. & G.* 315.
(*e*) 5 *De G. & S.* 676.
(*f*) 1 *Johnson*, 54.
(*g*) *Ibid.* 43.
(*h*) *Vol.* 1, *p.* 261 (*4th edit.*).

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March 14.

The question is, whether, on the terms of the will, the testator intended to dispose of the whole of his personal estate.

It is properly observed, that the word "goods" does not affect the question, because the expression is "my goods and furniture," making a distinction between them, though furniture would be included under the description of "goods." The only question is, whether it passes under the words "money and notes;" and I am much disposed to think that the question is to be treated in the same way as if it occurred as to a similar question regarding the residue of all the personal property.

The reported cases are not easily reconcileable, except in this respect, that they all agree in this: that where, from the will, it appears, that the testator intended to include all his personal estate, the word "moneys" will be sufficiently large to cover it, but otherwise the word "moneys" is to be read in its restricted sense.

Of the numerous cases cited and citable, I shall notice only two which are favorable to the widow as taking the whole, and two which are unfavorable to her, and which lead to the construction that the property which is not specifically mentioned goes to the next of kin.

In *Dowson* v. *Gaskoin* (*a*) the testatrix gave pecuniary legacies and 200*l.* each to her executors, "and whatever remained of moneys" to the five children of *E. D.* Lord *Langdale* held, that this was a gift of her stock,

(*a*) 2 *Keen*, 14.

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stock, and there was every appearance of her intending to include her whole personal estate when she gave legacies payable out of her general personal estate to one, and then made a bequest of "whatever remained of moneys" to others.

The other case is *Waite* v. *Combes* (*a*), where the testator directed his executors "to take and receive all moneys that might be in his possession or due to him at the time of his decease" and invest it for his wife for life. Vice-Chancellor *Knight Bruce* held, because there was no other means of giving effect to the word "moneys," that this was equivalent to a gift of the general personal estate. These cases also seem to determine this: that wherever legacies are given, payable out of the estate, the gift of the "residue of the money" would include all the personal estate.

On the other hand, there are two cases unfavorable to the widow, namely, *Godsden* v. *Dotterill* (*b*), and *Lowe* v. *Thomas* (*c*).

The case of *Godsden* v. *Dotterill* seems scarcely consistent with *Dowson* v. *Gaskoin*; it is certainly very difficult to reconcile them. In *Godsden* v. *Dotterill* the testator gave legacies of money "and the rest of my money to be equally divided" between his brother and niece. Sir *John Leach* considered the case with some care, and came to the conclusion, that the words, "the rest of my money" did not pass Consols. He said "I have no doubt that it was the intention of this testator, that the stock should pass under the term "money," but if it be settled, that stock shall not pass under the term "money," unless there be some explanatory context

(*a*) 5 *De G. & S.* 676.
(*b*) 1 *Myl. & K.* 56.
(*c*) 1 *Kay*, 369; 5 *De G., M. & G.* 315.

text in the will, I am afraid the testator's intention will not be effectuated, for here there is no such explanatory context."

On a subsequent day he said "I was desirous of looking into the authorities before deciding the case, and I find the authorities confirm the impression I had at the hearing of the cause, that the term 'money' will not pass stock unless there is in the will some explanatory context, and here is no explanatory context."

I doubt very much whether any rule can be laid down. It would seem difficult to justify this conclusion :—that if sufficient be found in a will to shew that the testator intended the stock to pass, still that the word should not be sufficient to effectuate that intention without explanatory context.

The case before me is infinitely weaker, but *Lowe* v. *Thomas*, which appears distinct, appears to me to govern this case. The words in *Lowe* v. *Thomas* were these, "I, *Ann Thomas*, do give and bequeath to my brother, *John Thomas*, the whole of my money for his life," and it was held by the Lords Justices, that stock did not pass. Here the expression is, "all moneys and notes." What confirms me in the impression that this is a specific bequest is this :—that there are gifts of three sorts of property separately ; first, there is the gift of "my goods and furniture," secondly, of "all my plate and linen," and thirdly, of "all moneys and notes that may be due to me at my decease."

I do not therefore consider that by the word "money" he intended to comprehend everything, but something separate and distinct. If I came to the conclusion on this will, that there was a disposition of the whole of the testator's

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testator's personal property, I should have no doubt that I ought to follow *Dowson* v. *Gaskoin*, rather than *Godsden* v. *Dotterill*. But I have not come to that conclusion, and I think that most probably the stock was not present to the testator's mind, and that he intended only to give those three enumerations of property which he has specified.

The result is, that this is a specific bequest, and that all charges on the estate will primarily fall on the residue of the property. I must make a declaration in favor of the Plaintiff.

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Feb. 17, 18, 21.

Mortgage of iron works and rolling mill, with the machinery, &c. specified in schedule, "and all engines, machinery, fixtures and things which might thereafter be fixed and fastened in or upon the same premises, whether in addition or substitution.

BROWN was entitled to a long lease of the premises at *Sheffield*, on which the *Albion Iron and Steel Works* were carried on.

By indenture of mortgage dated the 23rd of *September*, 1856, *Brown* granted and assigned to *Vickers* the *Albion Iron and Steel Works*, piece or parcel of land, rolling mill and hereditaments, with the appurtenances, and also all that steam engine set up and fixed for working the said rolling mill, and the boilers, wheels, shafts, machinery, gearing apparatus, trains of rolls,

Held, that the words "fastened in or upon the same premises" governed the sentence, and that subsequent additions, consisting of an engine for turning a lathe, a steam hammer and anvil, a boiler and furnace, passed to the mortgagees; but that cutters, bed plate, straightening plate, and the metal flooring of the mill, did not.

Under an assignment of the machinery fastened in or upon a mill, *Held*, that an anvil, though not fastened or fixed to it, passed, as essential to a fixed steam hammer.

Prior to a mortgage, the mortgagee's valuer included certain articles in his valuation, and which the mortgagees expected would be comprised in their mortgage, but they were omitted from the deed. A bill to rectify the deed, by including them, was dismissed, there being no proof of a common mistake of mortgagor and mortgagees.

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rolls, shears, fixtures and things of in and connected with the said rolling mill, and which are specified in the schedule, under the said indenture of mortgage written, *and all engines, machinery, fixtures and things which might thereafter be fixed and fastened in or upon the same premises*, whether in addition to or substitution of the several fixtures, machinery, articles and things specified in the said schedule.

The schedule referred to contained the following articles and things :—" Four steam boilers and steam pipes and valves complete; sixty horse power steam engine complete; driving wheel and shaft; fly wheel and shaft; two speed wheels and shaft; long underground shaft; four speed wheels at end of ditto; long train of rolls for file steel, consisting of bed plate and its foundation, ten standards or housings, one pair of pinions, and four pair of rolls with spindles and coupling boxes to each pair; train of rolls for rounds, &c., consisting of bed plate and foundations, ten standards or housings, three pinions, three high set of rolls, pair of two feet rolls, and two pairs of twelve inch rolls with spindles and coupling boxes complete; turning lathe; pair of shears; forty tons or upwards of cast metal floor plates; nine large metal pillars and girders for roof of rolling mill."

On the 18th of *February*, 1857, *Brown* mortgaged the same property, by the same description and with a similar schedule, to the Plaintiffs, for securing 1,500*l*. The first mortgage also became, by transfer, vested in the Plaintiffs.

On the 31st of *August*, 1857, *Brown* assigned all the machinery, fixtures, articles and things in the mill to Defendants, as trustees for their creditors, subject to the prior mortgages.

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After the date of the mortgages, several variations took place in the machinery, &c., &c., of the mill, and additions were made thereto.

The first question was, whether these additions to the mill, made after the mortgages, passed by the mortgage deeds, or to the trustees for the creditors under the subsequent assignment. These consisted of—(1) a donkey engine; (2) an engine for turning a lathe; (3) a steam hammer and its anvil; (4) a boiler and furnace; (5) cutters; (6) bed plates; (7) straightening plate; and (8) the metal flooring of the mill. The circumstances relating to their fixity are fully stated in the judgment. The Plaintiffs filed this bill for a declaration of their right to these articles, and for an injunction to restrain their removal.

The Plaintiffs also, by their bill, prayed the rectification of the second deed under the following circumstances:—Some of the articles, which had been added to the mill between the dates of the two mortgages, had been included in the valuation of the Plaintiffs' valuer, but the schedule of the first mortgage was retained verbatim in the second. Upon this, the Plaintiffs insisted, that it was intended by both parties that these additional articles should be included in the second mortgage, and they asked by their bill, that the second mortgage might be rectified, by inserting these articles in the schedule thereto.

Mr. *R. Palmer* and Mr. *W. Wyllys Mackeson* for the Plaintiffs.

Mr. *Lloyd* and Mr. *T. H. Terrell* for the trustees of the creditors' deed.

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The following cases were cited:—*Trappes* v. *Harter* (*a*); *Fisher* v. *Dixon* (*b*); *Hare* v. *Horton* (*c*); *Ex parte Barclay* (*d*); *Whitmore* v. *Empson* (*e*); *Hatchinson* v. *Kay* (*f*); *Ex parte Reynell* (*g*); *Ex parte Bentley* (*h*); *Ex parte Cotton* (*i*); *Mather* v. *Fraser* (*k*); *Hubbard* v. *Bagshaw* (*l*); *Wiltshear* v. *Cottrell* (*m*); *Place* v. *Fugg* (*n*); *Winn* v. *Ingilby* (*o*); *Waterfall* v. *Penistone* (*p*); *Skipp* v. *Harwood* (*q*); *Williams* v. *Evans* (*r*).

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The view I take of this case is shortly this:—that those words which have been so much commented on:—"and all engines, machinery, fixtures and things which may be hereafter fixed and fastened in or upon the said premises," &c., include any new additional machinery which is fastened and fixed to the mill, and not only mere additions to the existing machinery. I think also, although there is a good deal of difficulty and obscurity about the clauses in the deed on this subject, that anything that was substituted for that which was loose at the time, and which was essential for the management and carrying on of the mill as a rolling mill, would, in equity, have passed under the words used. But I do not think it is necessary to go into that question, because it does not arise here.

I am

(*a*) 2 *Cr. & M.* 153.
(*b*) 12 *Cl. & Fin.* 312.
(*c*) 5 *Barn. & Ad.* 715.
(*d*) 5 *De Gex, M. & G.* 403.
(*e*) 23 *Beav.* 313.
(*f*) 23 *Beav.* 413.
(*g*) 2 *M., D. & De G.* 443.
(*h*) 2 *M., D. & De G.* 591.
(*i*) 2 *M., D. & De G.* 725.
(*k*) 2 *Kay & J.* 536.
(*l*) 4 *Sim.* 326.
(*m*) 1 *Ell. & B.* 764.
(*n*) 4 *Man. & Ry.* 227.
(*o*) 5 *Barn. & Ald.* 625.
(*p*) 6 *Ell. & B.* 876.
(*q*) 2 *Swan.* 586.
(*r*) 23 *Beav.* 239.

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I am of opinion that the words "fixed and fastened" must, for the purpose of every question that comes before me, according to the true construction of this deed, be considered as governing the whole sentence; consequently, the Court has nothing to do but to examine the evidence in respect to each of those particular articles brought before it, with a view to see whether, in the proper legal sense of the term, they are "fixed and fastened in or upon the premises," using the word "fixed" in the same way as Vice-Chancellor *Wood* did in the case of *Mather* v. *Fraser* (*a*), and with whose observations on this subject I fully concur.

I will take them in their order. The first was a question about a donkey engine, which was given up by the Plaintiffs and is not claimed. The second and third, the engine for the turning lathe and the steam hammer, stand in the same position, and I take them together. As to them it appears from the evidence that some *Ashlar* stone is laid upon a proper foundation made for it, of some depth in the ground, and this *Ashlar* stone is fixed to it with mortar in the ordinary way, and then the firm part of the steam hammer is screwed down on the stone by a number of screws. I am of opinion that this is fixed into the ground, and that it is a fixture in the ground in the sense in which the Vice-Chancellor used it in *Mather* v. *Fraser*. The *Ashlar* stone is clearly fixed into the ground, an excavation being made of a greater or less degree of depth, as a proper foundation for this stone, which is built up in a proper manner, and upon this the hammer is fastened. The hammer may, no doubt, be removed, as in fact a steam engine may be removed from every species of mill, yet,

(*a*) 2 *Kay & J.* 536.

yet, if it is built into the premises, it is treated as "fixed or fastened" to them.

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I am, therefore, of opinion that this steam hammer is "fixed or fastened" to the freehold, and that it comes within the operation of the mortgage deed. The anvil, though it is not fixed upon the ground, forms part of it, upon the very just distinction taken by Vice-Chancellor *Wood*, that it essentially forms part of the machine, and which would be incomplete without it, just as much as a pump handle, which, though it may be removed from the pump, is still part of the pump, and passes with the freehold. I am, therefore, of opinion that the engine for the turning lathe and the steam hammer and anvil pass to the mortgagees under the terms of the deed.

I am of opinion, also, that the boiler is fastened to the freehold, for it is fixed in the same way. An excavation is made for a proper foundation, which is then built up with bricks for the purpose of receiving it. The boiler is then placed on certain supports in the brickwork, on which it rests; then two or three tiers of additional bricks are raised up for the purpose of fastening it, and it is thus completely fixed there. It is impossible to say that that is not built into or attached to the freehold. If this be not attached to the freehold nothing can be, for you must take away the brick work in order to extricate it, in the same way as in the case of a copper or an oven that is fixed into the ground. It might as well be argued that any thing that was so used was not attached to the freehold, because, by taking away the brick work, you might take away a brewing copper. I am clearly of opinion that it is affixed to the ground.

I had more doubt about the furnace, but Mr. *Davis's* evidence

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evidence satisfies me that the furnace is also fixed to the freehold. It appears to stand thus: in the first place, a foundation is built of common brick, which, as in the other cases, goes down a certain depth into the ground, making a foundation on which the common brick is built. The furnace itself is constructed of fire bricks, fastened together with fire clay, in a peculiar mode, by which they are united, so as to form the greatest protection against fire which they are capable of attaining, it is then cased with iron plates, and fastened with iron rods, which are driven through in various directions. If it were merely resting on the brick work, so that you might be easily removed from one part of the mill to another, I should have had very considerable doubt whether it was or was not a fixture. But the evidence shews that the fire bricks, which rest upon the common bricks which form the foundation, are attached to them by mortar in the usual mode of uniting one set of bricks with another. Two species of bricks, it is true, are used, but that does not alter the case. Besides this, two of the iron plates at the mouth of the furnace descend in the ground some little distance. On the whole I am of opinion that this also is a fixture.

The cutters do not appear to me to be fixed. There appears to be a bed plate, which is not fastened at all, by any process, into the ground. The usual mode of putting bed plates, according to the witnesses' account, when well done, is to make a solid foundation for them, sometimes of *Ashlar*, sometimes mixed with wood, and then rest the bed plate on that; but the bed plate is not fixed to it in any way whatever, there is not such a thing as a screw. They may clearly be moved, though no doubt it requires a very considerable degree of power to move them, as they are very heavy, but they rest

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on the foundation, and have been introduced into the mill since the date of this deed.

The cutter does not appear to me to be in any degree fastened to the freehold nor is the bed plate. Even if the bed plate were so fastened to the freehold, I doubt whether a cutter merely wedged in with pieces of wood, which you may easily remove at pleasure, is anything different than what comes within the case of *Hutchinson* v. *Kemp*.

The same thing applies to the straightening plates, though a small portion of them penetrates into the ground for a few inches, however, that is merely accidental, it is not for the purpose of using the straightening plate, and it is merely made in that form, for the purpose of correcting irregularities in its construction at the time it was originally cast. Accordingly, the straightening plate, when laid down, does not appear to me to be a fixture or "fixed or fastened" into the ground, but must be treated as a thing which might be removed.

As to the metal flooring of the mill, which was put down subsequent to the two mortgage deeds, I am of opinion it cannot be treated as included in the mortgages; it appears to me to be quite loose. No question arises as to its being essential to the working of the mill, because if half the mill were floored, the rolling mill could carry on its operations, although, no doubt, the mill would be more perfect and convenient if the whole of the floor were covered with these metal plates.

Some of the metal flooring was put down between the date of the deeds, and this gives rise to another question,

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question, whether the Court can reform the second deed.

I am of opinion that I cannot alter the deed by Mr. *Crossley's* valuation. I have no doubt that the parties who advanced their money intended to include in the deed, not only the metal flooring, but everything contained in Mr. *Crossley's* valuation, including both the hammer and the metal flooring; but I cannot reform the deed, unless it were proved to my satisfaction that there had been a common mistake, that is, a mistake of both parties. There is nothing to satisfy me that Mr. *Brown* made any mistake on the subject. It may well be that the mortgagees did not intend to advance their money unless all these things were included in their security; if so, they ought to have taken care that the schedule was so framed as to include them. Therefore I think, that this part of the metal flooring falls within the same category as the metal flooring introduced subsequent to the date of both deeds, and that it must be treated as not passing to the Plaintiffs under the mortgage.

Re MATTHEWS.

Jan. 29.

Upon a petition to appoint new trustees of a separation deed, on the death of the sole trustee, it was objected, that the deed was void, in consequence of the father's thereby abandoning his right to the custody of his children. The Court declined on this occasion deciding as to its validity, but appointed new trustees to protect the property.

DIFFERENCES having arisen between *George Matthews* and *Ann* his wife, they agreed to separate, and that Mrs. *Matthews* should have the custody of the two children.

By an indenture, dated the 1st of *October*, 1853, and made between *George Matthews* of the one part, and *Stephen Clark* (the brother of Mrs. *Matthews*) of the other part, Mr. *Matthews* assigned to *Stephen Clark* a policy for 1,500*l.*, and his life interest in 1,000*l.*, upon trusts, as to the policy, for Mrs. *Matthews* and the two children of the marriage; and as to the life interest in the 1,000*l.*, to keep on foot the policy; and subject thereto, upon trust to pay and apply the same for the benefit of the children of *George Matthews* and *Ann* his wife, in such manner as *Stephen Clark*, his executors or administrators, should, in his or their discretion, think fit; and subject thereto, upon trust for the use of the said *George Matthews*. And Mr. *Matthews* covenanted with *Stephen Clark*, that he would permit and suffer *Ann Matthews* to live separately and apart from him, as if she were a *feme sole*, and also would permit and suffer *Ann Matthews* to have the custody, charge and entire control of and over their said two children. And *Stephen Clark* covenanted with *George Matthews* to keep him indemnified against all liability or obligation to provide for and maintain his wife, and against her debts and engagements, &c.

Stephen Clark died on the 18th day of *October*, 1858, intestate, leaving *Ann Matthews* his sole next of kin,

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Re MATTHEWS.

and no letters of administration of his estate and effects had as yet been granted.

There being no power to appoint new trustees in the deed, this petition was presented by Mrs. *Matthews* and her two children, praying, that in conformity with the 32nd, 34th and 35th sections of the Trustee Act, 1850, and the 9th section of the 15 & 16 *Vict.* c. 55, the Court would appoint three persons, who were named and were willing to accept the trusts, to be trustees of the indenture of the 1st of *October*, 1853, in substitution for *Stephen Clark*, deceased, and would vest the trust premises in them upon the trusts of that indenture.

Mr. *Charnock*, in support of the petition.

Mr. *Selwyn*, for Mrs. *Matthews*, opposed the petition, on the ground that the settlement was void, as opposed to the principles of public policy, by reason of the father's abandoning his right to the custody of his children; *Hope* v. *Hope* (*a*); *Vansittart* v. *Vansittart* (*b*).

The MASTER *of the* ROLLS said, he should express no opinion as to the validity of the separation deed, which could not be determined on this occasion, though he fully concurred in the decisions referred to.

That he had jurisdiction and was bound to appoint new trustees to protect the property for the persons rightfully entitled to it, but in doing so, he did not intend to affect the rights or liabilities of any parties under the deed.

(*a*) 4 *De G., M. & G.* 328; 26 *L. J.* (*Ch.*), 417.
(*b*) 4 *Kay & J.* 62; 2 *De G. & J.* 249.

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ROTHERAM *v.* ROTHERAM.

March 25.

Since the Wills Act (1 *Vict.* c. 26), real estate passing by a residuary devise is subject to debts in priority of specific legacies, that statute rendering a residuary devise no longer specific.

BY his will, dated in 1848, the testator gave and bequeathed all his household furniture, plate, linen and china to the Plaintiff (his widow) absolutely. He gave legacies of 500*l.* each to his sons, and devised his freehold and copyhold hereditaments at *Berkeswell* to his widow *durante viduitate*, with remainder to his daughters. And he devised and bequeathed all the *residue* of his real and personal estate to his wife *durante viduitate*, with remainder to his children equally.

The testator died in 1853, and his personal estate (2,450*l.*) was insufficient to pay his debts (6,000*l.*, of which 1,900*l.* were specialty), and the question was, whether the personalty specifically bequeathed to the widow or the real estate passing under the residuary gift was first applicable to the payment of the debts.

Mr. *Southgate*, for the Plaintiff, relied on *Dady* v. *Hartridge* (*a*), in opposition to *Eddels* v. *Johnson* (*b*).

Mr. *E. Webster* cited *Long* v. *Short* (*c*).

Mr. *Whitbread* cited *Biederman* v. *Seymour* (*d*); *Emuss* v. *Smith* (*e*); *Edwards* v. *Pugh* (*f*).

The MASTER *of the* ROLLS.

I must follow the decision of Vice-Chancellor *Kindersley*.

(*a*) 32 *L. T.* 7.
(*b*) 27 *L. J.* (*Ch.*), 302.
(*c*) 1 *Peere W.* 403.
(*d*) 3 *Beav.* 368.
(*e*) 2 *De G. & S.* 722.
(*f*) 2 *Jarm. on Wills*, 2*nd ed.*, 527.

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MOLLETT *v.* ENEQUIST. (No. 2.)

April 16.

An injunction was granted to stay an action at law until answer. The Defendant having put in a full answer, gave notice of motion to dissolve, after which, the Plaintiff amended his bill. The answer shewing a mere legal question :— *Held*, that the injunction must be dissolved, and that the Plaintiff was not, on this occasion, entitled to have it continued on the case alleged by the amendments.

THE Defendant had brought an action at law against the Plaintiffs, who filed the present bill (*a*), and exceptions had been allowed to the Defendant's answer. The Plaintiffs obtained, on the 28th of *July*, 1858 (upon proper affidavits), an injunction to stay the action at law until answer or further order. The Defendant put in a further answer, and the time for excepting having expired and the answer being therefore sufficient, the Defendant gave notice of motion to dissolve the injunction. The Plaintiffs afterwards amended their bill, and required further discovery.

From the answer, it appeared to the Court that the only question in the action was one properly determinable at law.

Mr. *Selwyn* and Mr. *Piggott*, for the Defendant, argued that the injunction ought to be dissolved, the Defendant having put in a full answer, from which it appeared that there was no question of equity to be determined between the parties; in other words, that there was no equity confessed.

Mr. *R. Palmer* and Mr. *Druce*, for the Plaintiffs, contended that the injunction ought to be continued until the Defendant had put in a full answer to the amended bill, which required material discovery in relation to his banking and commercial transactions, which would

(*a*) 25 *Beav.* 609.

would elucidate this matter. They commented on the answers, as shewing a case of suspicion, which ought to be fully sifted; and they argued, that the Court had now complete jurisdiction to try the question between the parties, even if it were a mere legal one.

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I do not think I can continue this injunction. It is important to consider in what way the late statute has altered the old practice upon the subject. Under the old practice of the Court, when a bill was filed for an injunction to restrain proceedings at law, the Plaintiff was entitled to the injunction until he obtained a sufficient answer. But where exceptions were allowed to the answer, the common order usually obtained, was, for leave to amend the bill, and that the Defendant should answer the amendments and exceptions together; in that case, the injunction was continued until a sufficient answer had been put in to the amended bill. If, however, the Plaintiff thought fit to adopt another course, and allowed the exceptions to be answered, and afterwards amended his bill, then the injunction was dissolved upon a mere motion of course, unless cause were shewn on the merits. The new statute required the Court to assimilate, as nearly as possible, the practice relating to injunctions to stay proceedings at law to the cases of special injunctions; and accordingly the Plaintiff was required to make an affidavit of merits with respect to his defence to the action at law, or to make out a case for coming into Equity. It was, therefore, supposed that the practice relating to each species of injunction was identical in all respects; but, having been a member of the Commission who recommended the alteration of the law, I have, on several former occasions, expressed my opinion that it was not intended by the

statute

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statute to take away from the Plaintiff the right and advantage of having a full discovery from the Defendant; and accordingly, not only have I acted upon that principle, but the Vice-Chancellors, concurring with me, have acted in the same manner.

Here, the Plaintiff has had the benefit of that principle, for he has obtained a full discovery, and a complete answer has been put in. But what has occurred, as I am informed, is this:—That the bill has been amended either yesterday or to-day, and that such amended bill is now put upon the file, and I am asked now to continue the injunction, upon inferences to be derived from the evasive answer given originally, coupled with the facts arising from the answers to the exceptions, which, it is alleged, shew a case of great suspicion. Upon this I do not mean to express any opinion, but assuming this to be so, it does not, in my opinion, make out an equitable case to be determined in this Court, but a question to be tried at law. The question might possibly be tried in this Court, still it is a purely legal one, a simple question of fact to be determined by a Court of Law, and on which it is probable, at the hearing of the cause, I should either direct an issue to try the question, or possibly summon a jury and examine witnesses *vivâ voce* before me for the purpose of determining it.

I am of opinion, therefore, that this is a question to be best determined at law, and that the Plaintiff has had all the discovery that he is entitled to up to the present time. If he is able to make a new case entitling him to an injunction, nothing that I now say will preclude him from adopting that course. I express no opinion further than this:—that Defendant having given the full amount

amount of discovery required, and it appearing that the question is one properly to be tried at law, I am of opinion that this injunction must be dissolved.

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NOTE.—*See Harris* v. *Collett, antè, p.* 222; *Senior* v. *Pritchard*, 16 *Beav.* 473; *Lovell* v. *Galloway*, 17 *Beav.* 1, *and* 19 *Beav.* 643; *Chilton* v. *Campbell*, 20 *Beav.* 531; *Mollett* v. *Enequist*, 25 *Beav.* 609; *Magnay* v. *Mines Royal Company*, 3 *Drew.* 130; *Fox* v. *Hill*, 2 *De G. & Jones*, 353; *Lloyd* v. *Adams*, 4 *Kay & J.* 467.

BAGSTER *v.* FACKERELL.

March 17.

Where a testator directs a sale of his real estate for purposes which wholly fail, the heir takes it as realty; but if the failure be only partial, he takes it as personalty.

THE testator *Edward Fackerell*, by his will, dated in 1780 (among other things), bequeathing to his cousin *James Fackerell* the elder the sum of 4*s.* per week, to be paid to him weekly during his life, and he devised all his estate to trustees, on trust to sell the same, and invest the moneys arising from such sale, together with all sums of money arising from the sale of his personal estate, (which by his said will he directed to be sold,) and then to be placed, in the joint names of the trustees for the time being, in the purchase of £3 per Cent. Consolidated Bank Annuities, in trust to apply the dividends thereof in payment of the annuities and weekly sums by his said will directed to be paid, and then to apply the residue of the dividends of the said trust stock according to the following directions in his will (that is to say):—"I do hereby direct, that as soon as conveniently may be after my decease, a proper and commodious house in the town of *Bridgewater* shall be taken by my trustees, on lease or otherwise, at such yearly rent as shall be agreed upon, and fitted up for a school for the reception and education of the children and grandchildren of my relations, *William Fackerell*, *James Fackerell*, junior, *Robert Greenfield* and *Catherine* his wife, *John Tucker* and *Anne*

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Anne his wife, and the two boys of *Sarah Lawrence*, widow, which said children and grandchildren, as they respectively attain their age of seven years, I will and direct that my said trustees shall place and clothe in the said school, at the expense of my estate, in such manner as they shall think proper, until each of them shall attain their respective ages of fourteen years, and then to put or place them out apprentices, to such trade or business as they my said executors and trustees for the time being, or the survivors or survivor of them, shall think fit and most conducive to their benefit. And that they my said trustees shall also admit and take into the said school such number of other boys and girls, the boys being two to one in proportion to the girls, as the yearly income or produce of my trust stock, from time to time, will be sufficient to educate, after paying the rent and taxes and other expenses attending the school, the salary of the master and mistress, and answering the other purposes hereinafter mentioned."

The testator died shortly afterwards. A suit of *Blandford* v. *Fackerell* being instituted for the execution of the trusts of the will, the Lord Chancellor, at the hearing in 1796 (*a*), declared that the devise and bequest in the testator's will, as a devise for the general purposes of establishing a charity, was void, as being within the act of parliament of the ninth year of the reign of his late majesty King *George* the Second, intituled "An Act to restrain the Disposition of Lands whereby the same become unalienable." But he declared that the children and grandchildren of the several persons named in the testator's will were entitled to the dispositions made in their favor by the will, so far as the

(*a*) *See* 4 *Bro. C. C.* 394 *and* 2 *Ves. jun.* 238.

the objects thereof were not too remote. And his Lordship declared, that the devises and dispositions contained in the testator's will (except as aforesaid) were to be considered as a trust for the testator's heir and next of kin.

The trustees were to lay before the Master a plan for educating these objects of the testator's bounty, and for placing such persons out apprentices.

The Master made his report in *December*, 1757, approving of a plan, which was confirmed by the Court.

There was, at present, only one person entitled to the benefit of the above devise and bequest, and the fund (after setting apart 500*l.*) had, therefore, become distributable.

The only question was, whether *James Fackerell* (deceased), the heir of the testator, took his real estate as realty or personalty, as on that depended the question who were now entitled to the existing fund.

Mr. *C. C. Barber*, for the Plaintiff.

Mr. *J. H. Palmer* insisted, that the testator's object for conversion having now failed, the conversion was to be regarded as only having taken effect to the extent of the object for which the conversion was directed, and that the heir took as realty, and that such must have been his intention.

Mr. *Follett* and Mr. *R. Moore*, *contrà*, were not heard.

Mr. *Surrage*, Mr. *Baggallay* and Mr. *Horsey*, for other parties.

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The Court will not inquire whether the intention would best be carried into effect by disposing of this as real or personal estate. The testator has plainly directed the absolute conversion of his real into personal estate, of the expediency of which he is the sole judge; and as he has given a clear direction that it should be sold, and the produce invested, no doubt he must have intended a conversion.

This distinction then arises, if the object of the conversion wholly fails, it is considered that the testator only intended the conversion for that purpose, which as it wholly fails, the intention also fails, and the heir-at-law takes the property as real estate. But if a part of the object does not fail, as it is impossible for the Court to determine how far the testator intended the conversion to go, the heir-at-law takes the residue of the property, but takes it as personal estate.

In other words, if the object totally fails, the property remains real estate, and as such descends to the heir; but if there be only a partial failure, the heir takes the surplus as personalty.

NOTE.—*See* 1 *Jarm. on Wills, p.* 554 (*2nd edit.*).

HODGKINSON and Others, on behalf, &c. *v.* THE NATIONAL LIVE STOCK INSURANCE COMPANY and Others.

April 18, 19, 21.

Directors of a company were alleged to have paid calls merely on a small portion of the shares for which they had subscribed the deed, and they had also, out of the company's funds, purchased part of the chairman's shares, and had cancelled a considerable number of those subscribed for by him and by themselves. This not being authorized by the constitution of the company or by the provisions of the deed of settlement:—*Held*, that it was not a matter of internal management to be confirmed by a general meeting, and a demurrer to a bill to make the directors liable was therefore overruled.

THIS bill was filed by three shareholders, "on behalf of themselves, and all other the shareholders" of this company, except the Defendants, against the company and the directors. It alleged to the effect following:—

The company was established and completely registered in 1853; the capital was to be 250,000*l.*, divided into 100,000 £2*l.* 10*s.* shares. The 110th clause of the deed of settlement provided as follows:—

"110. That the first instalment, of 10*s.* per share, shall be paid, by the several shareholders, on or within thirty days from the complete registration of the company, and by such who shall become shareholders and execute these presents after the complete registration of the company, or of the deed referring thereto, or duplicate thereof, within twenty-one days from such execution."

Johnstone, the chairman of the directors, executed the deed for 4,000 shares, and the seven other directors for 11,000 shares between them; but disregarding the 110th clause of the deed, they each paid the first instalment of 10*s.* a share on 500 shares only, leaving 5,500*l.* of the first instalment unpaid. This was discovered by a committee of investigation on the 1st of *March*, 1858.

The bill alleged:—"19. In the latter part of the year 1855, the Defendant *Edward Johnstone*, who had paid

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paid the deposit on 500 shares of the 4,000 shares for which he had subscribed the deed of settlement, was desirous of retiring from the company, and in fraud of the Plaintiffs and the other shareholders of the company (other than the Defendants) the directors agreed with the other Defendants, his co-directors, that he should be exonerated from all liability in respect of the 4,000 shares for which he had subscribed the deed of settlement and that he should be deemed to be, and should be made to appear as the holder of 500 shares in the company, and upon which he had paid the deposit, and that the company, out of its funds, should purchase of *Johnstone* such 500 shares, and that he should transfer the same to the company or some nominee or trustee on its behalf, and that some provision should be made to indemnify him from the consequences of having subscribed the deed of settlement for 4,000 shares. The Defendants the directors well knew, at this time, as the facts were, that the expenses and losses of the company exceeded its income, and that the company had not succeeded in obtaining any return for its paid-up capital, and that the dividends theretofore paid to the shareholders had been paid out of the capital funds of the company."

The directors accordingly purchased of *Johnstone*, out of the funds of the company, his 500 shares, and they cancelled his remaining shares, for which he had subscribed the deed. They in like manner cancelled the extra shares (beyond 500 each) of the seven other directors.

The bill contained the following allegations:—"51. The cancellation by the directors of the shares for which they severally subscribed the deed of settlement was illegal and fraudulent, and void as against the Plaintiffs

Plaintiffs and the other shareholders in the said company, other than the Defendants the directors.

"52. The purchase by the directors, on behalf of the company, and payment, therefore, out of the funds of the company, of the 500 shares in the company of *Johnstone*, was a fraud upon the Plaintiffs and the other shareholders of the company, *and was not authorized by the constitution thereof, or by the provisions of the said deed of settlement.*" And the Plaintiffs insisted, that the directors had rendered themselves liable to make good all sums applied by them towards the payment for the said shares, and were also liable for the deposit of 10*s.* per share on all the shares for which they had subscribed the deed of settlement.

The bill also complained of misrepresentations made by the directors as to the affairs of the company. That the committee of investigation having resolved to call an extraordinary general meeting of the shareholders to consider the position of the company, the directors, to frustrate it, had *unnecessarily* made a further call of 5*s.* per share, payable on the 28th of *April*, 1858, and had postponed the general meeting until six days afterwards (the 4th of *May*), the consequence of which was, that those who did not pay the unnecessary call would be disqualified and prevented voting.

In regard to parties to the suit, it alleged,—"37. The Defendants the directors held the extraordinary general meeting on the 4th day of *May*, 1858, but the Plaintiffs, for the reasons aforesaid, did not pay up the call of 5*s.* per share, and consequently, by the terms of the said deed, were disqualified from attending and voting at such meeting. The Plaintiffs are unable to discover whether any of the shareholders of the company

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pany (other than the Defendants the directors) have paid the call of 5*s.* per share, and if any of such other shareholders have in fact paid the call, they are, for all the purposes of this suit, represented by the Defendants the directors, and if any such there be they are known only to the Defendants the directors, who have refused to give to the Plaintiffs any information with reference thereto, although they have been requested so to do, and the Defendants ought to discover and set forth the names of such shareholders, if any such there be."

The bill after referred to the proceedings stated *ante* (*a*), and prayed:—

1. A declaration that the Defendants were not entitled to make the call of 5*s.* per share, or any other call, until the directors had paid the amounts due on the cancelled shares.

2. A declaration that the cancellation of the directors' shares was wholly illegal, fraudulent and void as against the shareholders, and that the directors were liable in respect of them, and might be decreed to pay the full amount now due on them.

3. A declaration that the purchases by the directors of the 500 shares in the company, out of its funds, was fraudulent and void as against the shareholders, and that the directors might repay it.

4. That a call, if necessary, might be made under the direction of the Court.

And for an injunction to restrain the enforcement of the last call and the forfeiture of the shares.

The Defendants demurred to this bill.

Mr.

(*a*) *In re The National Live Stock Company, ante*, p. 153.

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Mr. *R. Palmer* and Mr. *W. W. Cooper*, in support of the demurrer, argued that the subjects complained of related to matters of internal management of a company, which might be affirmed by a general meeting, and in which, according to the authorities, this Court would not interfere.

Mr. *Selwyn*, Mr. *T. H. Terrell* and Mr. *Stiffe*, in support of the bill, argued that a general meeting had no power to bind the individual shareholders in respect of these matters, and that a fraud and breach of trust had been practised and committed by the directors, for which they were responsible in this Court.

Mr. *R. Palmer* in reply.

The following authorities were relied on:—*Foss* v. *Harbottle* (*a*); *Mozley* v. *Alston* (*b*); *Kent* v. *Jackson* (*c*); *Bluch* v. *Mallalue* (*d*); *Preston* v. *The Grand Collier Dock Company* (*e*); *Williams* v. *Page* (*f*); *Daniell's Case* (*g*); *Munts' Case* (*h*); *Holt's Case* (*i*); *Clements* v. *Bowes* (*k*); *In re The Athenæum Life Insurance Society* (*l*); *Attorney-General* v. *The Corporation of Poole* (*m*); *Hichens* v. *Congreve* (*n*); *The York and North Midland* v. *Hudson* (*o*); *Lord* v. *The Copper Mining Company* (*p*); *Yetts* v. *The Norfolk Railway Company* (*q*); *Bailey* v. *The Birkenhead, &c. Railway Company* (*r*); *Ex parte Morgan* (*s*); *Taylor* v. *Hughes* (*t*); *The Exeter and Crediton Railway Company* v. *Buller* (*u*).

The

(*a*) 2 *Hare*, 461, 468.
(*b*) 1 *Phil.* 790.
(*c*) 14 *Beav.* 367.
(*d*) *Post.*
(*e*) 11 *Sim.* 327.
(*f*) 24 *Beav.* 654.
(*g*) 22 *Beav.* 43.
(*h*) *Ibid.* 55.
(*i*) *Ibid.* 48.
(*k*) 1 *Drew.* 684.
(*l*) 4 *Kay & J.* 549.
(*m*) 4 *Myl. & Cr.* 17.
(*n*) 4 *Russ.* 562.
(*o*) 16 *Beav.* 485.
(*p*) 2 *Phil.* 740.
(*q*) 3 *De Gex & Sm.* 293.
(*r*) 12 *Beav.* 433.
(*s*) 1 *Mac. & G.* 228.
(*t*) 2 *Jones & L.* 24.
(*u*) 5 *Railw. Ca.* 211.

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The MASTER *of the* ROLLS.

On reading over the bill, I am confirmed in my impression, and I think that the demurrer must be overruled. There is a great deal alleged in the bill on which I shall express no opinion until the hearing, resting my decision on the point principally argued. But taking the allegations in the bill most favorably for the Defendants, I think that this is not a matter which could be affirmed by a general meeting. The 52nd paragraph of the bill is decisive. It is this—[*His Honor read it.*]

It was suggested that you must take everything most strongly against the pleader, and that there is not a direct prohibition against the purchase and cancellation of shares. I think that the fair way of treating this allegation is, that the acts were not authorized by the deed; in other words, that it was contrary to the deed of settlement, and whether one or the other, it was not in any respect authorized, and I am of opinion that it is a matter which could not be confirmed by a general meeting. Therefore, without disputing the authority of the case of *Foss* v. *Harbottle* (*a*), which I have always followed, I am of opinion that there is a sufficient allegation of equity in the bill, and that the demurrer must be overruled.

I will either reserve the costs of demurrer, or make them costs in the cause.

(*a*) 2 *Hare*, 461, 468.

NOTE.—Affirmed by the Lords Justices, 14th *June*, 1859.

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GREENWOOD *v.* JEMMETT.

Nov. 9, 10.

A testatrix, who was entitled to half of her sister's residuary estate, bequeathed a large legacy, which, if it should fail, she directed should fall "into her own estate." She bequeathed the residue of her property (except that derived from her sister) to *A.*, and the residue of her property derived from her sister's estate to *B.* *Held*, that the latter must contribute with the former towards payment of the debts, expenses and legacies.

PHŒBE LANCASTER, by her will and codicil dated respectively in 1851 and 1854, bequeathed certain legacies and half her residue to her sister *Frances Greenwood*.

Frances Greenwood, by her will dated in 1856, gave certain trivial specific chattels in her possession, some small pecuniary legacies and one large legacy to one for life, with remainders over, and if these remainders should fail, she directed this legacy to fall into *her own estate*. She then proceeded thus:—"And as to the residue of *my property* (excluding therefrom what I may derive from the estate of my sister *Phœbe*, in the event of my surviving her), I bequeath the same to the three sons of the said *Thomas Greenwood* the elder, or such of them as may be living at my death; and as to the residue of *my property* that may consist of what I may derive from the estate of my said sister, I bequeath the same unto my five nephews and nieces, or such of them as may be living at my death."

Phœbe Lancaster died in 1857, and *Frances Greenwood* in 1858.

The executors of *Phœbe Lancaster* paid and transferred to the executors of *Frances Greenwood*, in respect of her legacies, the sum of 7,000*l.* £3 per Cents., 85*l.* Long Annuities and 1,500*l.* *East India* Stock, and her share of the residue was computed at 12,000*l.*

This was a special case, and the Plaintiffs, the three sons of *Thomas Greenwood*, submitted, that according to the true construction of the will of *Frances Greenwood*,

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wood, that portion of her estate which she derived from her sister *Phœbe* was liable to contribute, rateably with the remaining portion of her estate, towards the payment of her debts, funeral and testamentary and other expenses, and towards the payment of the legacies given by her will.

The Defendants, the five nephews and nieces, contended that they were entitled to their legacy without any such liability to contribution. The question was now submitted for the opinion of the Court.

Mr. *Lloyd* and Mr. *Roundell Palmer* for the Plaintiffs. *Frances Greenwood* has divided her residue into two portions, viz. the one derived by her from her sister, and the other consisting of her own property. These two portions, though given to two different classes of persons, constitute, in fact, the residuary estate of the testatrix, and they must both contribute, rateably, towards the payment of her debts and legacies.

Mr. *Shapter* and Mr. *Kingdon* for the Defendants. The testatrix makes a distinction between that portion of her property which she derived from her sister and her own. The latter she emphatically calls "my property" twice over, although she afterwards uses the expression "my property that may consist of what I may derive from my sister." She first proceeds to dispose of her own property by giving specific chattels, such as chairs, &c. in her actual possession, and in no way derived from her sister, and then gives small pecuniary legacies and a large legacy, which latter, in certain events, is to fall into *her own* estate. It cannot be supposed that this legacy was to be raised out of the *two* estates, and on failure to fall into *one*; she must have meant it to fall into the fund from which it was taken,

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taken, and it must therefore be taken from *her own* estate alone. The principle *noscitur a sociis* applies, and shews that the other small pecuniary legacies were to come out of her *own* estate.

The testatrix, having up to this point dealt with her *own* property exclusively, then proceeds to dispose of her residue, which she gives to the Plaintiffs, with an exception of what she derived from her sister, and this she gives to the Defendants. Though the testatrix calls the property derived from her sister *residue*, still it is a specific bequest of what was excepted out of the residuary bequest to the Plaintiffs, and was a particular residue. The word residue often means *aliquot share*; *Lloyd* v. *Lloyd* (*a*); *Easum* v. *Appleford* (*b*); *Page* v. *Leapingwell* (*c*).

Mr. *Lloyd* in reply. There is nothing absurd in a testatrix desiring a large legacy to be raised out of two funds, and on failure of the gift to fall into one of those funds exclusively; and that supposed difficulty being removed out of the way, the case resolves itself into a simple division of residue into two shares, after the whole estate has borne all its legitimate legal burdens.

The MASTER *of the* ROLLS was of opinion that the word "residue" was used in the same sense in both instances; viz., as something remaining after bearing the burdens on it. He declared that the two estates must contribute rateably towards the payment of the debts, expenses and all the pecuniary legacies.

(*a*) 4 *Beav.* 231. (*b*) 5 *Myl. & Cr.* 56. (*c*) 18 *Ves.* 463.

NOTE.—Affirmed by the Lords Justices.

1859.

SMITH *v.* HOUBLON.

April 29.

A father had an exclusive power of appointment in favor of his children over a fund, which, in default, was limited to them equally, and, as representative of a deceased son, he was, in default of appointment, beneficially entitled to one-third of the fund. The father released the power to his mortgagees:—*Held*, that the power had been effectually destroyed, and the Court declared the rights of the parties consequent on such destruction.

BY a settlement made on the marriage of Mr. and Mrs. *Cotton*, in 1833, funds were vested in trustees, on trust for Mr. *Cotton* for life, with remainder to Mrs. *Cotton* for life, and after the death of the survivor, "upon trust for all and every, or such one or more, in exclusion of any other or others, of the child or children of the marriage," to be vested and payable at such time or respective times, and in such shares, &c. &c., as Mr. and Mrs. *Cotton* jointly, or the survivor, should appoint; and, in default of appointment, in trust for all the children in equal shares.

The settlement contained a proviso, giving over the shares of any dying under twenty-one without having been married, and a hotchpot clause, together with the usual powers for maintenance, &c.

Mrs. *Cotton* died in 1838. There were three children of the marriage, viz., *John*, *Maria* and *Mariann*. *John* attained twenty-one, and died in 1857, intestate and without having been married, and his father, Mr. *Cotton*, was his legal personal representative. *Maria* had attained twenty-one, and was living, but *Mariann* was still an infant.

In 1858, Mr. *Cotton* assigned all the one undivided equal third part or share in the trust funds, to which he, as next of kin and administrator of his son, was then entitled, by way of mortgage, to secure 11,000*l*. And Mr. *Cotton* thereby released and for ever discharged the said one-

one-third share of the trust funds of and from the power of appointment given or limited to him, to the end and intent that the same share might thenceforth be discharged and exonerated from the power of appointment, and that he might be absolutely excluded from exercising the same power, so far as respected the same share; but so, nevertheless, as not to prejudice his powers over the portion of the trust funds not thereby assigned.

This partial release of the power was considered by the parties nugatory.

The mortgage was afterwards transferred, and by a deed executed in 1859, and made between Mr. *Cotton* of the one part, and the transferees of the mortgage of the other, Mr. *Cotton* thereby released and for ever discharged, unto the transferees, all the trust funds, of and from the power of appointment given to him by the settlement, to the end and intent that the same trust funds might thenceforth be discharged and exonerated from his power of appointment, and that he might be barred and absolutely excluded from exercising the same power as to any portion of the trust funds, and that such trust funds might devolve according to the provisions made by the marriage settlement in default of appointment.

This suit was instituted by the mortgagees, Mr. *Cotton* and *Maria Cotton*, against the trustees, and they insisted that under the circumstances hereinbefore stated, the mortgagees were entitled to one third portion of the trust funds, and that another third portion of the trust funds was vested in *Alexander Cotton* for his life, with an absolute and indefeazible remainder to *Maria Cotton*, and that they were entitled to demand a transfer to them of the last-mentioned third portion, and were desirous of having such transfer effected. The bill also stated,

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stated, that the trustees were unwilling to make such transfers without the sanction of this Court.

The bill prayed that the rights of all parties to the funds might be ascertained and declared, and that the trust funds might be divided and apportioned amongst the parties interested therein; and for a declaration, that the son *John's* share, on the release of the power, became vested in the mortgagees. It also prayed for a transfer of the shares of *John* and *Maria*.

Mr. *R. Palmer* and Mr. *Hobhouse*, for the Plaintiffs. At one time, great doubts were entertained whether such a power as this could be released or extinguished, but it was ultimately settled that it could; *West* v. *Berney* (*a*); *Smith* v. *Death* (*b*); *Horner* v. *Swann* (*c*); *Bickley* v. *Guest* (*d*); *Sugd. on Powers* (*e*).

This case differs from *Cunynghame* v. *Thurlow* (*f*), for there the donee of the power, by the deed releasing it, obtained for himself a personal benefit, to which he would not otherwise have been entitled. Here the case is otherwise, and the release is to the mortgagees, as against whom, the mortgagor could not execute the power, in derogation of his own grant.

Mr. *Osborne* for the Defendants, the trustees of the settlement. This case is governed by *Cunynghame* v. *Thurlow*, where it was decided that the father could not have any benefit from his own act in releasing a power; the point as to a release to a purchaser for valuable consideration was not raised.

The

(*a*) 1 *Russ. & M.* 431.
(*b*) 5 *Madd.* 371.
(*c*) 1 *Turn. & R.* 430.
(*d*) 1 *Russ. & M.* 440.
(*e*) *Vol.* 1, *pp.* 101, 102 (*6th edit.*)
(*f*) 1 *Russ. & Myl.* 436.

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I will merely declare, that the power was effectually released by the deed of 1859, and the rights of the parties consequent thereon.

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April 29.
June 1.

A testator desired that every legatee under his will should "contribute £1 per cent. out of their legacies to Mrs. *W.* and her children. *Held*, that the specific legatees and annuitants and residuary legatee (both in respect of the residuary personal estate and of the produce of real estate directed to be converted) were bound to contribute.

Bequest "to *A.* and her children," expressed in another part of the will as a gift "to *A.* and her family.' *Held*, that *A.* took for life.

Generally speaking, annuities are legacies, although a distinction is made between them, in many cases, arising from the peculiar terms of the will.

"Residue" is not a "legacy," in the ordinary sense of the term, though the person taking it is a residuary legatee.

THE question in this special case arose on the will and codicils of *James Adams Gordon*.

By his will, dated in 1852, the testator devised his mansion-house called *Stocks House* and his *Stocks Estate* to his wife for life, with remainders over. And he directed that all his plate, china, fixtures, books and furniture, which should be in or about or belong to his said mansion-house thereinbefore devised, and also all such furniture as should be purchased and placed therein by his executors thereinafter named, pursuant to the declaration thereinafter contained, and also his grand piano-forte in the *Pantechnicon*, should be annexed to the same mansion-house as heir-looms to go with the same. And he directed his executors to lay out and expend, in the enlargement, embellishment, repair and completion of his mansion-house called *Stocks House*, and the erection of two new lodges thereto, according to certain plans and elevations which had been prepared and approved by him, and with such modifications of detail as circumstances might, in the judgment of his executors, render desirable and expedient, and in refurnishing the same mansion-house, such a sum of money as might, in their judgment, be necessary for the purpose,

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purpose, not exceeding in the whole the sum of 3,000*l.* And he bequeathed to his wife his marquetterie book-case, and all the *Sevres* china in his mansion-house at *Narsh*, and also all his furniture, plate, books and effects which should be in or about or belonging to his mansion-house at *Knockespock* at his death, absolutely, and also the sum of 1,000*l*, which he directed should be paid to her by his executors immediately or as soon as conveniently might be after his decease.

And he devised the residue of his real and personal estate to trustees, upon trust to sell all his real estate, and to convert and get in his residuary personal estate, and after payment of his funeral expenses and debts and the legacy thereinbefore bequeathed to his wife, and after setting apart and providing a sum of 3,000*l.* for the purposes thereinbefore expressed, upon trust to pay such *legacies and annuities* as he might bequeath by any codicil to his will, and upon trust to pay the clear residue of his said residuary estate (after satisfying the bequests aforesaid) unto his wife absolutely. And he declared that no such annuitant should be allowed to accept the value of his or her said annuity in lieu thereof.

The testator afterwards made several codicils to his will, by which he gave a great number of legacies and annuities, some of the latter being so small as 10*l.* and 15*l.* a year.

By his fourth codicil he expressed himself in the following terms:—"*Whereas the last legacy of Nelson to his country has been so ungratefully ignored, and whereas I have done my humble best to carry it out in my lifetime, I hereby desire, that every legatee under this my last will and codicils shall also contribute* £1 *per cent., out of their legacies, to Mrs. Horatia Ward and her children;*

nor

nor will they grudge it, if they read the life and deeds of *Nelson*, without whom they would never have the other ninety-nine parts to enjoy."

By his fifth codicil he gave a number of pecuniary legacies, two of which were 50*l.* only, and proceeded thus:—"And it is my will that each of the above legacies pay £1 per cent. to Mrs. *Horatia Ward*, of *Tenterden*, and her family."

The testator died in 1854, and questions arose as to the effect of the bequest to the Plaintiff "Mrs. *Ward* and her children," and with reference to the words "and it is my will that each of the above legatees pay £1 per cent. to Mrs. *Horatia Ward*, of *Tenterden*, and her family."

Mrs. *Ward* and her children contended that all the real and personal estate, of every kind and description, devised or bequeathed by the testator, and whether specifically devised or bequeathed, and whether directed to be sold and converted or not, and howsoever given or disposed of, was liable to contribute £1 per cent. in their favor.

It was submitted, on the other hand, that the *Stocks House* and estates and hereditaments devised therewith, and the chattels directed to go with the same, and the 3,000*l.* directed to be laid out in embellishing the house and in building lodges and otherwise, and the several annuities, and the chattels specifically bequeathed, and the legacies to servants, were not bound to contribute in any way. And further, that the residue was not bound to contribute (whether consisting of personal estate or real estate directed to be converted or of whatsoever it might consist), and that, at all events, if the residue was bound to contribute, the jointure of 600*l.* a year to which

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which Mrs. *Gordon* was entitled under her marriage settlement, and the charge of 2,000*l.*, ought to be deducted from the value of such, if any, residuary real estate as was bound to contribute.

In addition to these, a question had arisen as to what interest the Plaintiff Mrs. *Ward* and her children took as between themselves, and in particular whether she took for life and they in remainder, or whether she and they all took jointly, and what was the meaning of the word "family."

The present was a special case framed in order to obtain the opinion of the Court on these questions. The case was argued by

Mr. *Lloyd* and Mr. *Giffard* for the Plaintiffs, and by

Mr. *R. Palmer* and Mr. *F. M. Nichols* for the Defendants. They cited:—*Nannock* v. *Horton* (*a*); *Johnson's Dict. tit "Legacy;" Cowell's Dict. tit. "Legacy;" Webster's Dict. tit. "Legacy;" Godolphin* (*b*); *Crooke* v. *De Vandes* (*c*); *Evans* v. *Crosbie* (*d*); *Windus* v. *Windus* (*e*); *Heath* v. *Weston* (*f*).

As to the interest taken by Mrs. *Ward* in the legacy, *Morse* v. *Morse* (*g*); *Dawson* v. *Bourne* (*h*), and *Crockett* v. *Crockett* (*i*), were cited.

The

(*a*) 7 *Ves.* 391.
(*b*) *Orph. Leg.*
(*c*) 9 *Ves.* 204.
(*d*) 15 *Simons*, 600.
(*e*) 6 *De Gex, M. & G.* 549; 21 *Beav.* 373.
(*f*) 3 *De Gex, M. & G.* 601.
(*g*) 2 *Simons*, 485.
(*h*) 16 *Beav.* 29.
(*i*) 2 *Phil.* 553.

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The questions raised by this special case are, first, whether the specific legatees are to contribute £1 per cent. on the value of their legacies; secondly, whether the annuitants are to contribute £1 per cent. on their annuities; thirdly, whether a sum, not exceeding 3,000*l.*, which is to be applied by the trustees, in their discretion, for the enlargement, embellishment, repair and completion of his mansion-house, erection of lodges, and refurnishing his house, is to contribute £1 per cent.; fourthly, whether the residuary estate is also to contribute £1 per cent.; and, finally, what are the interests of Mrs. *Horatia Ward* and her children under the bequest, whatever it may be.

The first thing to be considered is this: What is the extent of the meaning of the word "*legacies*" in the fourth codicil? According to the plain import of the word, it includes specific as well as pecuniary legacies. I think, then, the burden of proof lies on those who dispute the claim of the Plaintiff to shew, that according to the true construction of the will, these words are confined to pecuniary legacies alone. I think it clear, that if the testator had, by his will, given a sum of Consols, standing in his name in the books of the Bank to one particular person, that legatee would have had to contribute £1 per cent. Why then is any distinction to be made between mere chattels specifically given and stock specifically given? The arguments against this construction are, first, the improbability of a testator intending such an awkward mode of making a bequest as by valuing all the specific chattels, and paying £1 per cent. on the amount to the legatee. Next, is is urged that, as to those chattels which are directed to go as heir-looms, they must properly be treated as part of

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of the real estate, and cannot fairly be regarded as legacies, in the proper sense of that term. In addition to this, it is also pointed out, that the gift to the Plaintiff specifies that contribution is to be made to her by the legatees, *out of their legacies*, and that contribution out of anything means a payment or delivery of a part of that thing, but that contribution, in that sense, cannot properly be made out of books or furniture or a piano-forte.

There is certainly much force in these arguments, and yet the expressions observed upon would be perfectly inappropriate as applied to a specific gift of stock, or of a debt, or of a balance at a banker's; and I do not feel myself at liberty to draw fine distinctions between two classes of specific legacies. I doubt whether the testator intended by the words "*out of*" to point out any particular description of legatees who were to contribute: and, as he has used the word "*legacies*" generally, I think all legacies must contribute: that is, all legatees, as a condition of taking their legacies, must pay £1 per cent. on the value of them to the Plaintiff and her children, and that this must be assessed in the same manner as legacy duty.

With respect to the 3,000*l.*, I think it does not contribute. My reasons for this are as follows. In the first place, the argument relative to the heir-looms, if ever applicable, is applicable to a gift of money for the improvement of the estate; but I principally rely on this, that the amount to be raised is, so much as, in the opinion of the trustees, not exceeding 3,000*l.* will be required for the purposes specified in the will. The limit of the gift, therefore, is the amount proper to be laid out on the estate; and no other element or measure of that amount is given, except that it is not to exceed 3,000*l.*

If,

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If, therefore, the trustees raise the exact amount they think necessary, and if they are accurate in their estimate, this consequence follows: that if that sum is reduced by a contribution of £1 per cent., the amount to be laid out will fall short by £1 per cent. of the sum necessary to be applied. The deficiency, no doubt, is small, but the principle must be the same, and the will furnishes me with no means of supplying that deficiency.

Another reason why I think this sum is not to contribute is, that a portion of the 3,000*l.* is to be laid out, if thought proper, in refurnishing the mansion-house, but if I am right in the conclusion I have come to on the first point, the furniture so bought and supplied to the person who enjoys the mansion-house under the will would be a legacy on which the legatees would have to contribute £1 per cent. on their interest. If therefore £1 per cent. were deducted from the whole sum expended by the trustees, one portion of it, namely, that devoted to the purchase of new furniture, would make this contribution of £1 per cent. twice over, which is clearly not intended by the will.

The next question is, whether the annuities are to contribute? Generally speaking, annuities are legacies; and although a distinction is made between them in many cases, arising from the peculiar terms of the will, I do not find anything which lead me to that result in the present case. Here the only words on which any reliance can be laid for this purpose are, that, in the concluding part of the will, the testator directs the residue shall be held in trust to pay "such *legacies and annuities* as he might bequeath by any codicil to his will." But I think this is not sufficient, and the more so, as the

reason

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reason given by the testator for the payment to the Plaintiff, and his belief that the legatees will not grudge the payment, applies as much to the annuitants as to the other legatees. It is said, that many of these annuities are small and are directed to be paid to servants and others in humble circumstances. That is true, but the weight of this argument is removed by the circumstance, that bequests of small sums of money are in the same position, and that they are not only included by general inference, but also by express words, as in the fifth codicil, where the words directing contribution follow six bequests, two of which are of fifty pounds each, supplying, therefore, in those cases, only a contribution of ten shillings each.

On the question of whether the residue is to contribute, I have felt more difficulty. It is a question on which I feel satisfied different persons will come to opposite conclusions, arising from the peculiar view they may take of the testator's words, and the force which they may attribute to them. On one hand, it is true, that "residue" is not a "legacy" in the ordinary sense of the term; and it was justly observed, that "residue" is what remains after payment of legacies. On the other hand, the person who takes the residue is always called *residuary legatee*; nor is there any other designation that I am aware of that is applied to the person taking that interest under any will. The words here are, "every legatee" is to contribute "out of their legacies." The residuary legatee is, in my opinion, included in the word "legatee," and "out of their legacies" means out of all their legacies. I think the testator did not mean, that because the residuary legatee was also a pecuniary legatee, the residue was to be excepted from contribution, and I found my opinion, not so much on the use of the word "*legatee*" as on the words of the codicil

to

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to which I have referred and repeat, namely, "Nor will they grudge it, if they read the life and deeds of *Nelson*, without whom they would never have the other ninety-nine parts to enjoy." Of what ninety-nine parts is he speaking? I think he means the ninety-nine parts of everything they take under the will. As far as the meaning of the testator can be gathered from these words, it seems to me as if he treated the preservation of his country as due to *Nelson*, and had reasoned something to this effect:—"Without him, I, the testator, should have had nothing to leave to any one, and as you, who take benefits under my will, get what you do because he has preserved it, you must not grudge giving up one-hundredth part of these benefits to the object of the dying regard and affection of that man who has preserved all that I give to you."

It is impossible to say this is clear. It certainly is no question of law, no decided cases throw the slightest light on the subject, it depends on what ideas these words of the testator convey to the mind of the man who reads and hears them, and the result, in my mind, is that which I have stated.

There is still one remaining question put to me by this special case, namely, what is the nature of the interest taken by the Plaintiff and her children in this bequest? I cannot find any distinct authority on this subject, but following the opinion of Lord *Cottenham* in *Crockett* v. *Crockett* (*a*), which this case closely resembles, I am of opinion, first, that the Plaintiff and her children do not take as joint tenants; and, next, adopting one of the alternatives suggested by the Lord Chancellor, I am of opinion that the Plaintiff takes an estate for life in

(*a*) 2 *Phil.* 553.

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in the fund (*a*), with a power of appointment amongst her children, and in default of appointment, and subject to her life estate, the children take the bequest equally among them, and I will answer the case accordingly.

Mr. *Lloyd.* Does the Court consider the real estate liable to contribute?

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As to the residuary real estate, it is converted into money by the direction to sell and pay the debts and legacies, and I treat it as liable to contribute; but I think that that part of the real estate which is not directed to be sold is not.

(*a*) *See Audsley* v. *Horn, ante, page* 195.

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Jan. 21.
Feb. 11.

The 1 *Will.* 4, c. 40 (as to the right of executors to the undisposed of residue), merely shifts the burden of proof from the next of kin to the executor.

Devise and bequest of residue of testator's property to *A.*, *B.* and *C.*, "upon trust" to convert and pay debts and certain legacies. The testator, in a subsequent clause, appointed *A.*, *B.* and *C.* his executors, and he died without next of kin. *Held*, that the Crown, as against the executors, was entitled to the undisposed of residue.

THE testator *Chambers Hall*, by his will dated the 8th of *February*, 1855, expressed himself as follows:—"I give, devise and bequeath unto *Charlotte Read* (widow of my late dear friend *David Charles Read*, late of *Salisbury*, artist), unto *Mary Read* (daughter of *Charlotte Read*), and unto my dear friend *Charles Henry Stedman*, esq., and to the survivors and survivor of them, and to the executors and administrators of such survivor, all my £3 per Centum Consolidated Bank Annuities, all my Long Annuities, and also all my Royal Exchange Stock, together with all the rest, residue and remainder of my property, of what nature or kind soever, and to which I am now in my own right, or to which I may or shall hereafter be or become entitled to, either in possession, reversion, remainder or expectancy, *upon trust*, in the first place, to collect and get in all my said estate and convert the same into money, and thereout to pay all my just debts, funeral and testamentary expenses and the expenses of proving this my will; and in the next place, to raise and pay the several legacies hereinafter given and bequeathed, or which I may hereafter give or bequeath by any codicil or codicils to this my will. He then bequeathed to his sister Mrs. *Eliza Stirling* 3,000*l.* £3 per Cent. Consols; to *Sarah Hall*, widow of his late brother *William Hall*, deceased, the interest, dividends and annual produce of and in the sum of 3,000*l.* Consols for life, and afterwards to her children; and he gave other legacies, &c. amongst them, he gave 500*l.* to *Charlotte Read*, 500*l.* to *Mary Read*, and 350*l.* to *Charles Henry Steadman* (the executors).

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His will proceeded thus:—"And I appoint the said *Charlotte Read*, the said *Mary Read* (daughter of the said *Charlotte Read*), and the said *Charles Henry Steadman*, executrixes and executor or this my will. And I direct, that the said *Charles Henry Stedman* shall be employed as the attorney and solicitor of the trustees and executors for the time being of this my will, and that he shall be paid, out of my moneys, estate and effects, all his professional costs, charges and expenses as such attorney and solicitor as aforesaid, as between attorney and client, notwithstanding his being such trustee and executor as aforesaid. Provided always, and I do hereby declare, that so often as any trustee or executor for the time being of this my will, who shall and may have accepted and acted under the trusts thereof, shall die or become unwilling or unable to act in the trusts hereby created, it shall be lawful for the surviving or continuing trustees or trustee, if he and they shall think fit, and if there shall be no such trustee then for the retiring trustee, and if there shall be no such trustee, then for the executors or administrators of the last deceased trustee, to nominate a new trustee and executor or trustees and executors to supply the said vacancy or vacancies, and such new trustee and executor, or trustees or executors, shall be competent to exercise all the powers and authorities herein contained. And I declare, that every trustee and executor of this my will shall be charged with all moneys only as he shall actually receive, and for his own acts, receipts, neglects and defaults only, notwithstanding his signing any receipt or other document for the sake of conformity, nor for any involuntary loss or losses, and that every trustee and executor shall be entitled to retain or pay himself all costs and expenses of or attending the execution of the trusts hereby in them reposed

as

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as aforesaid, or any matter or thing relating to this my will."

The testator afterwards made a codicil, whereby, after giving some charitable legacies, he proceeded in these words:—" I give and bequeath unto *Charlotte Read*, in addition to what I have before given her by my will, the sum of 1,000*l.* £3 per Centum Consolidated Bank Annuities, to and for her own sole use and benefit, in testimony of my gratitude, and as an additional mark of my respect and esteem for her, in waiting and attending upon me, with such continued and undeviating kindness, throughout the whole period of the long and painful sickness with which it has pleased God to afflict me."

The testator died shortly after the date of the codicil, and his will and codicils were, on the 19th of *September*, 1855, proved by the Plaintiff, Mrs. *Read*, and the Defendant *Charles Henry Stedman*, power being reserved of making the like grant to the Defendant *Mary Read*, the other executrix named in the said will (she being an infant), when she should apply for the same, which, however, she had never yet done.

The testator was an illegitimate child, and he had never been married. A question arose, whether the Crown or the Plaintiff and the Defendant *Charles Henry Stedman* and *Mary Read* were entitled to the undisposed of residue of the personal estate of the testator. The *Attorney-General* claimed such undisposed of residue of the personal estate on behalf of the Crown.

Mr. *R. Palmer* and Mr. *Southgate*, for the Plaintiff *Charlotte Read*. The executors are entitled to the residue as against the Crown, notwithstanding the 11 *Geo.* 4 & 1 *Will.* 4, c. 40, which is inapplicable

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to such a case. The legacies to the executors do not affect the question, for they are unequal; *Williams on Executors* (*a*); besides, the testator assigns a reason for each legacy bequeathed by him, and he gives the legacies to his executors from motives of friendship and gratitude, and not for the trouble which the office might impose upon them. The trusts to be performed are limited, and the trustee clauses will be satisfied, by their application to the bequest to *Sarah Hall* and her children; *Williams* v. *Roberts* (*b*). Here there is no connection between the appointment of executors and the trust in the first part of the will, and Sir *W. Grant* decided *Dawson* v. *Clark* (*c*) on this ground: his decree, though criticised by Lord *Eldon* (*d*), was not overruled: and in the subsequent case of *Southouse* v. *Bate* (*e*), Sir *W. Grant* stated that he still retained his opinion on the subject. This decision was followed in *Russell* v. *Clowes* (*f*).

Mr. *Whitbread* for *Mary Read.*

Mr. *Lee* and Mr. *Miller*, for *Charles Henry Stedman.* The executors have a legal right to the residue, which is only to be displaced (as Lord *Thurlow* expressed it) by "irresistible inference to the contrary;" *Bowker* v. *Hunter* (*g*), or by "strong and violent presumption to the contrary;" *Clennell* v. *Lewthwaite* (*h*). Though called trustees, there is no clear intention to make them trustees of the residue; *Pratt* v. *Sladden* (*i*). The testator knew he was illegitimate, and he must be taken to have known the legal consequences of his appointing his friends to be his executors.

Mr.

(*a*) *Page* 1166 (3*rd edit.*)
(*b*) 27 *L. J., Chan.* 177.
(*c*) 15 *Ves.* 409.
(*d*) 19 *Ves.* 247.
(*e*) 2 *Ves. & B.* 399.
(*f*) 2 *Coll.* 648.
(*g*) 1 *Bro. C. C.* 330.
(*h*) 2 *Ves. Jun.* 470.
(*i*) 14 *Ves.* 193.

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Mr. *Wickens*, for the Crown. I admit that the question is to be decided by the law previous to the 1 *Will.* 4, c. 40; but this question was expressly decided in *Ellcock* v. *Mapp* (*a*) by the House of Lords. *Russell* v. *Clowes* (*b*) must, therefore, be considered as overruled. In the latter case, a petition of appeal was prepared on behalf of the Crown, but next of kin afterwards appeared and swept away the fund from both litigants, and thus prevented that case being reviewed by a higher tribunal. Here, the gift is to the executors "*upon trust*," and the testator afterwards calls them "trustees and executors;" they cannot, therefore, take beneficially property held in trust; again, the trustee clauses are inconsistent with a notion that they were to take the property for their own use.

Mr. *R. Palmer*, in reply.

The MASTER *of the* ROLLS.

Feb. 11.

The question which arises on this will is, whether the executors of *Chambers Hall* take the residue of his estate which is not disposed of by his will. Although the will is dated the 8th of *February*, 1855, and the Act was passed in 1830, still it does not affect this question; because it simply directed that the residue of personal estate undisposed of by a testator should, in case there was no evidence of a contrary intention, to be discovered on the face of the will, go to the next of kin and not to the executors (*c*); in effect, it merely shifted the burden of proof from the next of kin to the executors. But in this case, the testator left no next of kin,

(*a*) 3 *H. L. Cas.* 492; 2 *Phil.* 793; 15 *Simons*, 568.

(*b*) 2 *Coll.* 648.

(*c*) 11 *Geo.* 4 & 1 *Will.* 4, *c.* 40.

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kin, and therefore the Statute does not apply, inasmuch as the question arises between the Crown and the executors. The question, therefore, now to be determined is exactly the same as it would have been if the will had been made and the testator had died before the passing of that Act and had left next of kin.

The circumstance that the legacies to these executors are of different amounts does not, in the slightest degree, prejudice their claim to the residue. But the question is this:—the property is given to them *in trust*. It is not disputed, and indeed it is settled by numerous authorities, that when property is given to persons as executors upon trust, they cannot take the residue undisposed of, and that so far as those trusts fail it goes to the next of kin.

But a distinction is taken by Sir *William Grant* in *Dawson* v. *Clark* (*a*), which is exactly applicable to the present case. In that case, as in this, the gift of the property was to certain persons by name, in trust, not at that part of the will which gave the bequest calling them executors, or giving them the property in that character; and, in a subsequent part of the will, the testator appointed the same persons executors. Sir *William Grant* says, "There is no connection between the appointment of executors and this trust in the first part of the will; nor are there any words, accompanying their appointment or subsequent to it, which imply that the testator considered them as subject, in that character, to any other trust than the law imposed upon them, or as having any other interest than that which the law gives them. They are, therefore, entitled to the residue for their own benefit." That

(*a*) 15 *Ves.* 409.

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That is the whole of that case which bears upon the subject now before me.

The question was brought before Lord *Eldon* by appeal, who, upon the first hearing, expressed a very strong opinion against the decision of Sir *William Grant*, giving, at the same time, reasons for his opinion, which no one can read without feeling their great force and strength. His lordship, however, took time to consider his judgment, and, after waiting a year and five months, he affirmed the decision of Sir *William Grant* upon another ground, upon which the Master of the Rolls had expressed no opinion.

Subsequently to this, the same questions came incidentally before Sir *William Grant*, in the case of *Southouse* v. *Bate* (*a*), when, after referring to Lord *Eldon's* judgment, of which a note had been handed up to him, he expressed his continued adherence to the opinion he had previously expressed, in favor of the peculiar distinction upon which he had founded his decision.

This question came again before the Lord Justice *Knight Bruce* in the case of *Russell* v. *Clowes* (*b*), who, after a long and careful argument, followed the decision of Sir *William Grant*. This decision was again confirmed by the decision of Vice-Chancellor *Shadwell* in *Mapp* v. *Ellcock* (*c*), but the case was taken, by appeal, before Lord *Cottenham*, who concurred with Lord *Eldon*, and reversed the decision of the Vice-Chancellor. The case was afterwards carried to the House of Lords, when the decision of Lord *Cottenham* was affirmed.

So

(*a*) 2 *Ves. & B.* 396.
(*b*) 2 *Coll.* 648.
(*c*) 15 *Simons*, 568.

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So that it is now to be considered as settled, by the highest authority, that the distinction upon which Sir *William Grant* rested his decision cannot now be supported.

I cannot help observing, though I do not think it necessary to refer to them in detail, that the observations of Lord *Eldon* appear to me to be wholly unanswerable.

The observations of Lord *Cottenham* in the case of *Mapp* v. *Ellcock* (*a*) appear to be such, as completely to govern the present case, if it were *res nova* and not already adjudicated upon; and I think that they admit of no substantial answer. His words are to this effect:—"Sir *William Grant's* opinion in *Dawson* v. *Clarke*, and the Vice-Chancellor's opinion in the present case, do not question the rule, that a gift to executors, as such, in trust, excludes their claim to any beneficial interest; and that if the property be left to any third persons in trust for purposes which fail, the executors have no claim. But it is contended, that if the property, instead of being left to the executors in trust, or to third persons in trust, be left to the executors, not as such but in their own names, upon trusts which fail or do not exhaust the property, those trustees, in their character of executors, are entitled to the residue as incident to their office. I cannot see any principle for this distinction. If the official and private character of the persons appointed executors are to be considered as distinct, it would seem to be immaterial whether the trustees were the same persons who were named executors or strangers; and if the two characters are to be considered as united, the case of a gift to executors in trust is complete. It seems to be admitted, that *Robinson*

(*a*) 2 *Phill.* 797.

son v. *Taylor* would negative the supposed distinction, unless a gift in trust 'to the executors hereinafter named' be so different from a gift to persons by name, who are afterwards appointed executors, as to operate as a transfer of the residue from the next of kin to the executors. It would be to be regretted if the title to property were to depend on such unsubstantial distinctions as these."

There is no word in this in which I do not concur. If the property is given to the executors by name (as in this case it is given to *Charlotte Read*, to *Mary Read* and to *Charles Henry Stedman*), not appointing them executors, but treating them quite distinctly from parties having any trust, it is quite clear they could take nothing in that property which was given to them in trust, except so far as the trusts were declared. If it is given to them in their character of executors, then it is also clear, upon the decided cases, that they cannot take it; and if this rule is to be applied to the present case, it is conclusive upon the point; and all the various passages which I have read contained in this will, and which relate to the duty of executors relative to this property, would make me hesitate long, even if the case of *Mapp* v. *Ellcock* had not been decided as it has, before I could have followed the decisions which follow Sir *William Grant's* rule in that case.

I entertain no doubt, therefore, from these passages and taking the whole together, that it is conclusively established, that the testator did not intend his executors to take this property beneficially, beyond the amounts of the legacies which he gave them, and I must therefore declare, that the Crown, and not the executors, is entitled to the residue.

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WILD *v.* MILNE.

April 21.

Several persons, who were jointly entitled to several leases of a colliery, worked it in copartnership. *Held*, on a dissolution, that one of the co-owners of the leases could not insist on a partition, though there might be no debts, but that the whole must be sold.

THE Plaintiff *Wild*, the Defendant *Milne*, and the five other co-Defendants, were engaged in working a colliery called the *Dean Colliery*. They had obtained seven leases of different parts of the property for terms ranging between twenty-one and forty years. There were no articles of partnership and no fixed term for its duration, but the partners were entitled in equal shares to the profits.

In consequence of some disagreements, the Plaintiff gave notice to dissolve, and instituted this suit against his co-partners to have the partnership wound-up. It did not allege that there were any debts, but it prayed that the partnership property might be sold and applied in payment of the debts and liabilities, and that the surplus might be divided.

This was resisted by the Defendant *Milne* alone, and the case was now brought on for hearing.

Mr. *R. Palmer* and Mr. *Eddis*, for the Plaintiff, contended that the partnership, being at will, might be determined at any time by any one of the partners; and secondly, that the leaseholds must be sold in the same way as all the other partnership property. They cited: *Featherstonhaugh* v. *Fenwick* (*a*); *Crawshay* v. *Maule* (*b*); *Darby* v. *Darby* (*c*).

Mr.

(*a*) 17 *Ves.* 298.
(*b*) 1 *Swan.* 498.
(*c*) 3 *Drew.* 501—505.

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Mr. *Lloyd* and Mr. *Fowler* for *Milne*. A sale of real estate is only ordered for the purpose of providing for the payment of the debts; but here it is not alleged that there are any debts, and therefore there is no necessity to sell the leasehold property. If a sale be unnecessary, one of several of the co-owners of a leasehold is not entitled to insist on a sale against the wishes of the others. The dissolution of the partnership restored the parties into the position of tenants in common of a leasehold property, and as such, they are only entitled to a partition.

The accounts ought, therefore, to be directed, but the sale postponed until it has been ascertained whether there are any debts to provide for. If there are none, there should be no sale. They referred to *Collyer on Partnership* (*a*).

Mr. *Bacon*, jun., for the other Defendants, concurred with the Plaintiff.

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I am clearly of opinion that this is an ordinary case of partnership, and that when it is dissolved or terminated, any one of the partners is entitled to have the whole assets disposed of. In this case, it is admitted that any one can put an end to the partnership; the result is, that that which forms the partnership assets must be disposed of for the purpose of settling the rights between the partners. I consider this established by *Crawshay* v. *Maule* (*b*), where the distinction between the individual interests of several persons in land,

(*a*) *Page* 784.

(*b*) 1 *Swanst.* 518, 526.

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land, where there is a trading partnership and where there is none, is adverted to. One of the cases points out the singular inconvenience which would follow, if I were to direct a sale of the plant and a partition of the land demised. Would the steam engine be included in the division, and, if so, how could it be possible to make a partition of the remainder? Are all the parties to have the use of the shaft, or a right of descending by means of the machinery? The Court is compelled, by the exigency and circumstances of these cases, to direct a sale. I shall, therefore, make the usual decree, and, according to the prayer of the bill, direct a sale.

The parties are entitled to an enquiry to ascertain how the partnership property can be most advantageously sold, and whether as a going concern or not.

Liberty to bid may be given to all the partners, except the one having the conduct of sale. Appoint a receiver and manager, with liberty to any party to propose himself, without salary.

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SMITH *v.* LLOYD.

March 15, 16.

A bill by a retiring member of a benefit building society against the trustees, to recover the Plaintiff's share was supported, and enquiries and accounts were directed. *Held*, also, that a rule to refer to arbitration did not oust the jurisdiction of this Court in such a case.

THE Plaintiff, as executrix of her husband, was entitled to eight shares, of 50*l.* each, in "*The Finsbury Benefit Building Society.*" The sixth rule of the society was as follows:—"Any member may, after having paid two quarters' subscriptions and expenses, withdraw from the society, in respect of any share or shares subscribed for by him, by giving one month's notice of his intention to the directors at any of their monthly meetings, and on leaving his pass-book at the office of the said society, provided sufficient funds are in the hands of the trustees, and he shall pay his share of the expenses of the said society up to the time of his withdrawing. If more than one member shall give notice on the same day of their intention to withdraw, they shall be paid according to the order in which the notices are received. All fines incurred by any member previously to the withdrawing from the society shall be deducted from the amount which he withdrawing shall be entitled to receive."

The Plaintiff, in 1856, gave notice to withdraw, and the amount due to her not having been paid, she filed this bill against the three trustees of the society, who had the society's moneys under their control, praying a declaration that she was entitled to withdraw from the society, and to be paid the amount which might be found due to her in respect of her shares; for an enquiry whether any of the members of the society had given notice of withdrawal previous to the Plaintiff, and for an account of the funds of the society in the hands of the Defendants, and that they might be ordered to pay the Plaintiff what might be found due to her.

The

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The Defendants stated, that several other members had given notice to withdraw prior to the Plaintiff. They stated that the twenty-fourth rule of the society was as follows:—"That in case of any dispute between any members of this society, or persons claiming on account thereof, and the trustees or directors thereof, such dispute shall be settled by arbitration," &c. They insisted upon this rule, and claimed the same benefit as if they had pleaded the same, they being willing to submit the said matters to arbitration according to this rule.

Mr. *Villiers* for the Plaintiff.

Mr. *Selwyn* and Mr. *Hopwood* for the Defendants. The Building Society Act (6 & 7 *Will.* 4, c. 32, s. 4) incorporates the Friendly Society Act (10 *Geo.* 4, c. 56), and makes the 24th rule of this society, to refer disputes to arbitration, imperative.

The Court of Chancery is not the proper forum for the litigation of disputes between the members of a benefit building society; *Trott* v. *Hughes* (*a*). In that case a shareholder had given notice to withdraw, and the Court refused to restrain the directors, by injunction, from parting with the funds in their hands, on the ground of the Plaintiff having a primary lien upon them for the return of his subscriptions, or of an apprehended mismanagement of those funds. Lord *Cranworth* there said:—The legislature, for the convenience of institutions of this kind, had provided a particular mode for settlement of disputes of this sort. By the 33rd regulation of the society, made in compliance with the directions of the legislature, the directors were enabled to

(*a*) 16 *L. T.* 260.

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to decide disputes between the society and any of its members. If that decision were satisfactory to both parties, well and good, but if not, then arbitrators were to be appointed." He afterwards adds:—"The case was one of a benefit society regulated by rules made in pursuance of certain acts of parliament. By one of these it had been provided, that disputes as to the construction of the rules, or any other matter relating to the society, should be referred to arbitration. The legislature had thus concluded the question, by the appointment of a tribunal—a less expensive and more appropriate one. The parties had not thought fit to comply with this rule, but, passing by the tribunal so appointed, had preferred to bring before this Court, already overloaded with business, the discussion of the construction of the rules and regulations of this association. The parties had, he thought, from beginning to end, proceeded upon an erroneous view of their position," and his Lordship dismissed the motion with costs.

Mr. *Villiers* in reply. The 10 *Geo.* 4, c. 56, has been repealed by the 13 & 14 *Vict.* c. 115 (*a*).

The cases of *Ex parte Bailey* (*b*), and *Re The St. George's Building Society* (*c*), were also cited.

The MASTER *of the* ROLLS.

March 16.

On looking into this case, I see nothing to oust the jurisdiction of the Court in these matters. I am of opinion

(*a*) *The subsequent Acts are* 15 & 16 *Vict.* c. 31; 15 & 16 *Vict.* c. 65; 16 & 17 *Vict.* c. 123; 17 & 18 *Vict.* c. 25; 17 & 18 *Vict.* c. 50; 17 & 18 *Vict.* c. 56; 17 & 18 *Vict.* c. 101; 18 & 19 *Vict.* c. 63; 19 & 20 *Vict.* c. 40; 21 & 22 *Vict.* c. 101.

(*b*) 5 *De G., M. & G.* 380.

(*c*) 4 *Drewry*, 154.

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opinion that the Court has jurisdiction(*a*), but whether the Plaintiff will ultimately succeed must depend on the result of the enquiries which I shall direct.

I concur in the argument on the construction of the rules, that the Plaintiff's husband was a member of society at his death, and that the Plaintiff now stands in his shoes; and it being admitted that the Plaintiff, on the death of her husband, was entitled to retire, that she has done so in a regular manner, and that she is entitled to something, the only questions remaining are, the amount due to her, and whether there is any fund available for the purpose of paying it. I am of opinion that I must direct enquiries to ascertain what was due to the Plaintiff on her retiring from this society, and whether there are any, and what, funds in the hands of the Defendants properly applicable to the payment of what may be due to her.

I concur in the observation that the retiring members are to be paid in succession, and that those who retire first must be first paid what is due to them.

(*a*) *See Crisp* v. *Bunbury*, 8 *Bing.* 394; *Tims* v. *Williams*, 3 *Q. B.* 431; *Doe* d. *Morrison* v. *Glover*, 15 *Q. B.* 103; *Cutbill* v. *Kingdom*, 1 *Exch.* 494; *Reeves* v. *White*, 17 *Q. B.* 995; *Ex parte Payne*, 5 *D. & L.* 679; *Grinham* v. *Card*, 7 *Exch. Rep.* 833; *Ex parte Milner*, 15 *Jur.* 1037; *Kelsall* v. *Tyler*, 25 *L. J., Exch.* 153; *The Queen* v. *Trafford*, 26 *L. J., Q. B.* 95; *Re Meredith*, 1 *C. B., N. S.* 216; *Smith* v. *Pryse*, 7 *Ell. & B.* 339; *Hull* v. *M'Farlane*, 2 *C. B.* 796; *Mullock* v. *Jenkins*, 14 *Beav.* 628; *Fleming* v. *Self*, 1 *Kay*, 518, *and* 3 *De G., M. & G.* 997.

NOTE.—The case was afterwards compromised.

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SPARROW *v.* FARMER.

Jan. 18, 19, 21.

April 18.

The estimated probable duration of a benefit building society was thirteen years. *Held*, on the rules and terms of the mortgage deed, that an advanced member was entitled to redeem on payment of his subscriptions to the end of the thirteen years, although he was still liable, under the rules, to continue to pay subscriptions until 120*l.* a share had been realized for every member.

THE *British Building and Investment Company* was established as a Benefit Building Society, in 1845, in the usual manner, under the 6 & 7 *Will.* 4, c. 32. A set of rules was duly certified, by which the objects and management of the society, and the rights of its members, were regulated and defined. The material parts of these rules, as affecting the question now before the Court, were as follows:—

I.

"The first subscription shall be due in *September*, 1845, and that all future subscriptions shall be paid at," &c., "*until the object of this company be fully accomplished.*"

II.

"The object of this company is, by the payments of its shareholders, to form a fund, from which money may be advanced, to enable them to purchase freehold or leasehold property, and, for this purpose, every shareholder shall be entitled to, out of the funds of this company, the sums mentioned in Table I. for every share he may subscribe for," &c. &c.

"Every shareholder shall, at the first subscription

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meeting, commence paying his subscription of 10*s.* for every share, and shall afterwards continue paying the said subscription money of 10*s.* per share per month at every succeeding monthly meeting, *until the objects of the company shall be fully accomplished.*"

VI.

Non-advanced members were to be allowed to withdraw from the company on giving one month's notice, and to receive, on each share, the sums mentioned in Table II. If more than one gave notice to withdraw, they were to be paid in rotation, according to the priority of notice.

IX.

Regulated the security to be taken for money advanced to members.

XXI.

"If any shareholder in this company, who shall have received his or her share or shares, or any of them, shall be desirous of paying and satisfying the security or securities which shall have been given for the same, he shall be at liberty to do so, by paying to the directors the subscriptions that would have become due on the shares advanced on such property *up to the end of the thirteenth year of this company*, and shall be allowed, on such payments, discount at 4*l.* per cent. per annum. And on payment thereof, together with all fines due in respect of such shares, the board shall direct the trustees to deliver all deeds and other documents in their custody relating to the security to the shareholder, and, at his or her cost, to endorse a receipt or acknowledgment on such mortgage according to the 6 & 7 *Will.* 4, c. 32, s. 5."

"XXXII. When

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XXXII.

"When it shall appear by the books of the company that there is sufficient to pay each unadvanced share 120*l.*, then all arrears of subscriptions, fines and other payments shall become due and shall be payable immediately, and the trustees shall enforce the payment as before expressed in these rules."

XXXIII.

TERMINATION OF THE COMPANY.

"When the sum of 120*l.* for each unadvanced share, with all other expenses and liabilities of the company, shall be fully realized, the accounts shall be finally audited, printed and sent to each shareholder, *and the company terminate*, and the trustees, with the advice of the solicitors of this company, shall deliver up to each shareholder, or his or her legal representative, the title deeds and other documents which shall have been deposited with them by such shareholders as a security to this company, and shall and will, at his or her request or expense, endorse, on his or her mortgage, a receipt for all the monies intended to be secured thereby, pursuant to the 6 & 7 *Will.* 4, s. 9. And that then, three-fourths in number of the shareholders present at any meeting specially convened, by giving seven days' notice to each member, shall have full power to declare this company at an end, and all the accounts thereof be finally closed, and such resolution shall be effectual, at law and in equity, as a release from all shareholders."

Attached to the rules were three tables, the two material ones were as follows; the third related to discount to be allowed on payments made in advance.

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TABLE I.

"Showing the amount shareholders are entitled to receive on each share they may hold for building or purchasing property.

			To be advanced on each share.		
During the	1st	year	£60	0	0
„	2nd	„	61	0	0
„	3rd	„	63	0	0
„	4th	„	66	0	0
„	5th	„	70	0	0
„	6th	„	74	0	0
„	7th	„	78	0	0
„	8th	„	82	0	0
„	9th	„	87	0	0
„	10th	„	92	0	0
„	11th	„	99	0	0
„	12th	„	108	0	0
„	13th	„	120	0	0

TABLE II.

"Showing the amount shareholders are entitled to receive on each share, if they withdraw from the company.

			Having paid in.	May draw out.		
At the end of the	1st	year ..	£6	£6	3*s.*	3*d.*
„	2nd	„ ..	12	12	12	6
„	3rd	„ ..	18	19	7	3
„	4th	„ ..	24	26	9	0
„	5th	„ ..	30	33	16	3
„	6th	„ ..	36	41	9	6
„	7th	„ ..	42	49	8	9
„	8th	„ ..	48	57	14	0
„	9th	„ ..	54	66	5	3
„	10th	„ ..	60	75	2	6
„	11th	„ ..	66	84	5	9
„	12th	„ ..	72	93	15	0
„	13th	„ ..	78	120	0	0

"In addition to the above sums, the directors may, from time to time, award a *bonus* on the withdrawal of shares

shares, the amount of *bonus* will depend on the degree of success experienced by the company."

The form of receipt to be endorsed on mortgages, by virtue of the Act 6 & 7 *Will.* 4, c. 32, s. 5, purported to acknowledge the receipt of "all money intended to be secured by the within written deed."

The Plaintiff became a member of the society in respect of four and four-fifths shares, and on the 25th of *April*, 1850, he obtained an advance of 360*l.* As a security, he conveyed some leasehold property to the trustees of the society, upon trust, so long as he "should duly make the several payments, and observe and perform the regulations prescribed in the articles of the society in respect of the shares, and also perform all the covenants therein contained," to permit him to retain possession; but if he should "at any time thereafter neglect to perform any of the covenants," or "to pay, observe and perform all or any of his subscriptions, payments and regulations on his part to be paid, &c.," then upon trust, "at any time thereafter," that the trustees might enter and appoint a receiver, or sell the property, and retain for the society "all such principal money, subscriptions or other payments as shall have been advanced to or shall be due by the said *S. L. Sparrow*, his executors, administrators or assigns, in respect of all or any of his said shares in the said society by virtue of the rules aforesaid (it being agreed by the parties hereto, that in case such sale shall take place, all monies which would, at any time afterwards, have become due from him or them, according to the subsisting rules of the said society, shall be considered as then actually due, and shall be fully deducted out of the monies received under the aforesaid powers), and

to

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to pay the residue of the said money unto" the Plaintiff.

And *Sparrow* thereby covenanted "to pay the subscriptions and other payments payable on his said shares, according to the rules of the society, on the days and in manner therein mentioned, and abide by and perform the rules thereof in respect of the said shares."

In *February*, 1858, a balance sheet was prepared by *Brooks*, the manager, which was approved of by a general meeting. Shortly afterwards *Brooks* absconded, having embezzled the moneys of the company, and it was then discovered, that the balance sheet was fictitious, and that the funds of the society were wholly insufficient, at the expiration of the thirteen years in *August*, 1858, to realize the 120*l.* for each unadvanced share.

The Plaintiff tendered to the Defendants (the trustees) the balance due for his subscriptions down to the end of the thirteen years, and he applied for a reconveyance of his mortgage security and the delivery up of the title deeds.

The trustees, however, refused to comply with the Plaintiff's request, on the ground that he was bound, by the terms of the mortgage deed and rules of the society, not only to pay the subscription on his shares for thirteen years, but also to continue his subscriptions until the termination of the society, which would not occur until the full sum of 120*l.* for each unadvanced share, with all expenses and liabilities of the society, could be fully satisfied.

The Plaintiff filed a common claim for redemption, claiming

claiming to have the title deeds delivered to him, and a receipt endorsed on his mortgage, according to the provisions of the Act.

Mr. *R. Palmer* and Mr. *Roxburgh* for the Plaintiff. The decisions in *Mosley* v. *Baker* (*a*) and *Fleming* v. *Self* (*b*) are inapplicable. They were decided upon the old form of rules adopted by building societies, but the present case depends upon one established on *Macarthur's* principles, which is quite distinct, and was prepared expressly to meet the former difficulties in redeeming, and to define the amount payable for that purpose. The right of redemption depends on the 21st rule, which is express, that an advanced member may redeem "by paying to the directors the subscriptions that would have been due on the shares advanced on such property up to the end of the thirteenth year of the company." This rule was introduced with the express object of preventing the uncertainty in the former cases as to the duration of the society. The terms on which a member may withdraw illustrates the rights of an advanced member to redeem, and shews that there is no liability after the thirteen years have expired; for any shareholder may, under the 6th rule, withdraw on the terms stated in Table II., so that if he retires in the twelfth year he is entitled to receive 93*l.* 15*s.*, and in the thirteenth year, 120*l.* in full.

The right to redeem is distinct from the liability to pay subscriptions subsequent to the thirteenth year, and the extended duration of the society under the 32nd and 33rd rules. There are three classes of members

(*a*) 6 *Hare*, 87; 1 *Hall & Twells*, 301.

(*b*) 3 *De Gex, M. & G.* 997.

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bers:—(1) the advanced; (2) the withdrawing; and (3) the continuing members. The third class take on themselves the risk of loss and the chance of profit, and therefore the accidental loss, arising from the defalcation of the manager, falls on those who have, voluntarily, remained unadvanced and continuing members.

Lastly, it is admitted to have been the practice of the society to allow members to redeem on the terms now insisted on: there is no reason why the Plaintiff's case should form an exception to that practice.

Mr. *Lloyd* and Mr. *Welford* for the trustees. A misfortune has happened to the society from the defalcation of its manager; all the existing members must therefore bear the loss. The intention, on the formation of the society, was that every member should receive 120*l.* either in money or land, and that the society should continue to exist until that object had been accomplished. This is an attempt, by one member, after a loss has occurred, to secure a clear 120*l.* for himself out of the funds of the society, leaving the other members to bear the whole deficiency: this is neither in accordance with the principles of equity or the scope and object of the rules. The Plaintiff has received his 120*l.* in advance, and the mortgage was intended to secure everything which might, at any time, become due from him under the rules of the society. The thirteen years was specified merely to fix the period which would probably be required in order to realize 120*l.* a share; but the 1st and 2nd rules are distinct, that the subscriptions are to continue "until the object of the society be fully accomplished;" and the operations of the society were not to cease until there

there was sufficient to pay each unadvanced the sum of 120*l.*

1859.

SPARROW v. FARMER.

The mortgage, being given to secure the subscriptions payable in respect of the shares prepaid, covers everything which might become due from the mortgagor before the expiration of the society, and on those terms only can the Plaintiff redeem, as in *Mosley* v. *Baker* (*a*); *Fleming* v. *Self* (*b*); *Seagrave* v. *Pope* (*c*); *Burbidge* v. *Cotton* (*d*).

The terms on the retirement of a member have no application. The Plaintiff did not give notice until the thirteenth year had expired, and the loss had been ascertained.

Mr. *R. Palmer* in reply.

The MASTER *of the* ROLLS.

April 18.

In this case, the answer made by Defendants to the claim of the Plaintiff is, that the covenant of the deed stipulated that the mortgagor should pay the amount so long as society should endure; that its duration is not limited to thirteen years or to any other number of years, but that it might be less or more; that it is limited to last as long as may be necessary in order to provide a fund sufficient to pay every unadvanced member the sum of 120*l.* per share.

The rules referred to are these:—the 1st, which provides that the subscription shall be paid "until the object

(*a*) 6 *Hare*, 87; 1 *Hall & Twells*, 301.
(*b*) 3 *De Gex, M. & G.* 997.
(*c*) 1 *De Gex, M. & G.* 783.
(*d*) 5 *De Gex & Sm.* 17.

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object of this society be fully accomplished," and the 32nd and 33rd, which state that the society is only to terminate when all the unadvanced members receive 120*l.* a share. It is said, that this was a species of partnership, that the same principle is applicable to the advanced and unadvanced members, all of whom are to receive 120*l.* per share, or property of that value.

I concur generally in this argument; and I think that the computation relative to thirteen years was a mere approximation of the anticipated duration of the society, but which might be more or less. But admitting the whole of this to be correct, it does not dispose of the question before me, which is this:—What was the contract of mortgage of the 25th *April*, 1850, between the Plaintiff and the trustees of the society? I think that this is determined by the express terms of the 21st rule.

It is, I think, impossible to get over the words of the 21st clause, and when the contract has been wholly performed by the Plaintiff on his part, refuse to give him the benefit of it, because it is inconsistent, not with the words but, with the spirit of the arrangement. Mr. *Lloyd* argued, that when two rules are conflicting, you must look at the nature of the transaction, in order to discover which of them is to prevail, and that effect must then be given to the one so distinguished. I think, however, that this principle is not applicable to the present case, for the rules are not contradictory. It was necessary to fix some limit to the probable duration of the society. This was done in order to obviate the difficulty which would arise in the previous cases of the advanced and withdrawing members, and to allow an advanced member to redeem on some fixed terms. It was for this purpose that a period of thir-

teen

teen years was specified, and the 21st rule framed. This does not determine the duration of the society, but it does determine the terms of the contract between the parties, and the condition on which the Plaintiff must be allowed to redeem.

Since the case was argued I have been furnished with the judgment of Baron *Martin* in a case of *Farmer* v. *Smith* (*a*), and I fully concur in the construction placed on the rules and mortgage of this society. The Court of Exchequer has expressed its opinion that the society was not terminated at the expiration of thirteen years, and that every advanced member must pay his subscription until the funds of the society are sufficient to realize 120*l.* for each unadvanced member. But still the mortgagor, on complying with terms of 21st rule, will be entitled to have the deeds returned to him, and to have a receipt endorsed on his mortage. I adopt the decision of Court of Exchequer, and assuming that the Plaintiff may be required to continue hereafter to pay his subscription, I still think that he is entitled to the benefit of contract, which, according to 21st rule of society, provides for redemption on certain terms.

I must make a decree for redemption, according to 21st rule, without prejudice to any action which may be brought against the Plaintiff in respect of subscriptions due from him subsequent to *September*, 1858, when the thirteen years expired.

The Plaintiff is entitled to his costs.

(*a*) 4 *H. & N.* 196.

1859.

YOUNG *v.* YOUNG.

March 11.

A testator bequeathed his personal estate to his wife, "discharged from the payment of his debts." He then devised his real estate in *Herefordshire* in trust to sell and pay "all his just debts, funeral and testamentary expenses" in exoneration of his personal estate, and he devised his real estates in *Norfolk*, without any expressed trust, for payment of his debts. The produce of the *Herefordshire* estates being insufficient to pay the debts, *Held*, that the *Norfolk* estates were next liable to pay them in exoneration of the personal estate.

THE testator bequeathed to his wife "all his plate, linen, &c., &c., and all other his personal estate and effects, for her own absolute use and benefit, *discharged from the payment of his debts*, but subject to the payment of the sum of 100*l.* to his sister." He then devised his real estate in *Herefordshire* to *two* trustees for sale, and out of the produce "in trust to pay, satisfy and discharge *all his just debts, funeral and testamentary expenses*," in exoneration of his personal estates; and after making the aforesaid payments, upon trust to pay over the residue to *three* other trustees. He then specifically devised five cottages at *Hillgay*, in *Norfolk*, to his wife for life, with ultimate remainders over to his four nephews and his niece in fee. He afterwards devised the residue of his real estates in *Norfolk* to the *three* trustees upon trust for sale, and to invest the produce, together with the surplus of the purchase-money of his *Herefordshire* estates, and pay the income to his wife for life, and after her death to the Plaintiff for life, with remainder to his four nephews and his neice.

The testator died in 1855; the trustees sold the *Herefordshire* property, but the produce, after paying the expenses and a mortgage on it, was insufficient to pay the whole of the testator's debts.

Doubts arose as to the proper order in which the assets of the testator ought to be applied in payment of his debts. The Plaintiff insisted, that his real estate at *Hillgay* and the other real estate in *Norfolk* were

were, by the will, made liable to be so applied, after the real estate in *Herefordshire*, in priority to the general personal estate. The Defendants, the four nephews and the niece, on the contrary, insisted that the testator's personal estate ought to be so applied, after the real estate in *Herefordshire*, in priority to the real estates at *Hillgay* and in *Norfolk*.

To determine the point a special case was prepared and the question submitted for the opinion of the Court was as follows:—Whether, upon the true construction of the testator's will, his personal estate ought to have been applied, in priority to his real estate in *Norfolk*, or his real estate in *Norfolk* in priority to his personal estate, in payment of such of his debts as were not discharged out of the purchase-moneys of his said real estate in *Herefordshire*.

Mr. *Selwyn* and Mr. *Blackmore*, for the Plaintiff, relied on *Morrow* v. *Bush* (*a*).

Mr. *Field*, for the nephews and niece, argued, that the general terms of exoneration in the first part of the will were afterwards explained and limited by the specific devise of a particular property to pay those debts. He cited *Colvile* v. *Middleton* (*b*).

Mr. *W. D. Lewis* for the trustees.

The MASTER *of the* ROLLS.

I am of opinion that the personal estate is exonerated in this case. The will gives the testator's personal estate to his wife "for her own absolute use and benefit

discharged

(*a*) 1 *Cox*, 185. (*b*) 3 *Beav.* 570.

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discharged from the payment of his debts. That means she is to take the personal estate discharged of all the debts. If I were to read it otherwise I must introduce some other words, such as these:—"except so far as the produce of my *Herefordshire* estate may be insufficient to pay," or "except so far as the fund after provided may prove insufficient for that purpose."

The case of *Morrow* v. *Bush* is, I think, decisive on the subject, and *Colvile* v. *Middleton* does not touch it. In that case I observe that *Morrow* v. *Bush* was cited.

Here there is a complete exoneration of personal estate from the payment of the testator's debts, and if so, then, after exhausting the produce of the *Herefordshire* estate, they must fall on the only other fund, which is the real estate in *Norfolk*.

TAITE *v.* SWINSTEAD.

February 22.
March 24.

THE testator, *Noah Slee*, by his will, dated in 1829, devised a piece of freehold building ground to four trustees and their heirs, upon the trusts following:—

As to one undivided fifth part thereof, for his son, *John Slee*, and his wife and children, in the manner that other part of his property was devised for their benefit.

As to one other undivided fifth part thereof, for his son, *Noah Slee*, his heirs and assigns.

As to one other undivided fifth part thereof, for his son, *Josiah Slee*, his heirs and assigns.

As to another undivided fifth part thereof, for his son-in-law, *T. H. Gould*, and *Elizabeth* his wife, their heirs and assigns.

And as to the remaining undivided fifth part thereof, for his son-in-law *Samuel Taite*, and *Mary Benson* his wife, and their children, in the same manner that other part of his the said testator's property was devised for their benefit.

An estate was devised to trustees for different persons in fifth shares, some of which shares were given to living persons absolutely, and the others to living persons for life, with remainder to their children in fee. An unlimited power of sale over the whole estate was given to the trustees. *Held*, that this power of sale was valid and could be exercised over the whole estate, so long as any of the trusts of any of the shares remained to be performed.

"But if his said trustees should think it desirable to sell the said piece or parcel of ground, then upon trust that they his said trustees, or the survivors or survivor of them, or the heirs or assigns of such survivor, should, as soon as conveniently might be after his decease, absolutely sell and dispose of the said piece or parcel of

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TAITE v. SWINSTEAD.

ground and hereditaments," and stand possessed of the proceeds of the said sale, *upon the like trusts* as were thereby declared of and concerning the said piece or parcel of ground.

There was also a maintenance clause during minority, and a declaration that the trustees' receipts should be good discharges.

The testator died in 1830. His trustees, in 1858, entered into a contract to sell the property to the Defendant. At this time, the parties beneficially interested in the property were as follows:—The children of *John* (their parents being dead) were absolutely entitled to one-fifth, and the gifts of one-fifth to *Noah*, *Josiah* and to *Gould* and wife were absolute. But a difficulty arose as to the one-fifth share devised to *Josiah* absolutely; it appeared that he died in 1838 intestate, leaving *Josiah Slee* the younger his heir-at-law, on whom his one-fifth share descended. *Josiah Slee* the younger, having attained twenty-one years, went to *Tasmania* in 1832, and resided for some time at *Hobart Town*. He afterwards left that place, and when he was last heard of, in the month of *June*, 1858, he was residing at *Sydney*, in *Australia*, but it was not known whether he was now alive or dead, or, if dead, whether he had left any child or had made any will.

As to the remaining one-fifth devised to *Samuel Taite* and wife and children, it appeared that her husband had died in 1832, and that, under the trusts of the will, the one-fifth share now stood limited to Mrs. *Taite* for life, with power to her to appoint among all her children, and for want of appointment, amongst all her children equally.

She

She had five children living, who had all attained twenty-one; but there was still the possibility of her having other children who might become entitled to participate in this one-fifth.

The Defendant (the purchaser) accepted the title to the premises, subject to this one objection, viz., that the Plaintiffs could not make a good title under the power of sale contained in the will, by reason of an original invalidity in such power, and by reason of the lapse of time and the other facts and circumstances which had happened since the testator's decease.

The Plaintiffs contended the contrary, that the objection to the exercise of the power of sale by the Plaintiffs was invalid, that, under the circumstances, the power of sale was valid, and that they could, by virtue thereof, make a good title.

Under these circumstances, the Plaintiffs and Defendant concurred in a special case, which now came on for argument.

Mr. *Bagshawe, jun.*, for the vendors, argued that the power of sale was valid, for it must be necessarily exercised within legal limits, and that, therefore, it did not offend against the law as to perpetuities.

Mr. *Jessel*, for the purchaser, argued, that although the power would have been good if it had been limited to the estate and interest of Mrs. *Taite* and her children, still that it was void as against such other persons as were entitled to an estate in fee simple in distinct shares of the estate. That such a power would be too remote if attached to the latter shares alone, and that it could

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not be rendered valid by being connected with other shares given in strict settlement.

Ware v. *Polhill* (*a*); *Trower* v. *Knightley* (*b*); *Lantsbery* v. *Collier* (*c*); *Wolley* v. *Jenkins* (*d*), were cited.

The MASTER *of the* ROLLS.

March 24. The question on this special case is, whether a power of sale given by the will of *Noah Slee* is still in force.

All the trusts of the share of *John Slee* are exhausted, and the persons now entitled to this share are his children, who are entitled to it in fee. *Noah Slee* is dead, and his heir is entitled to his one-fifth in fee. *Josiah Slee* is also dead; the heir who is entitled to this share in fee is abroad, and it is not known where he is; he, however, is entitled to one-fifth in fee, wherever he may be. The trusts relative to the share of Mr. and Mrs. *Gould* are exhausted: he is dead, and his widow, Mrs. *Gould*, is, under the trusts of the will, entitled to this one-fifth in fee. The only remaining share is that settled on Mr. and Mrs. *Taite*, and their children. He is dead, leaving children, and this one-fifth is now vested in the trustees, in trust for Mrs. *Taite* for life, with remainder to her children in fee.

The question is, whether, as the trusts of this latter one-fifth alone are still subsisting, the power of sale over the whole property is still in existence, and capable of being exercised by the trustees.

Although

(*a*) 11 *Ves.* 257.
(*b*) 6 *Madd.* 134.
(*c*) 2 *K. & J.* 709.
(*d*) 23 *Beav.* 56.

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Although the doctrine in *Ware* v. *Polhill* (*a*) may have been limited to a narrower extent than what it was originally supposed to have decided, viz., that general powers of sale were always bad as offending against the rule against perpetuities, it is, I think clear, in accordance with the recognized authority of that case, that if an estate be given to trustees, in trust for certain persons, as tenants in common in fee, with a power of sale given to the trustees without any limit, the power of sale would be invalid, because, if it were exercisable at all, it would be exercisable *in perpetuum* and as long as the estates given to the *cestuis que trust* lasted. But, on the other hand, if the estate was given to trustees in trust for certain persons for life, in succession, with an ultimate remainder to persons in fee, and a power of sale was intrusted to those trustees, the power of sale would, in my opinion, subsist until the trust was exhausted; in other words, until the persons entitled to the remainder in fee had a right to call upon the trustees to convey to them the absolute interest in their shares. And the circumstance that one person was entitled to have his share in the fee conveyed to him, while the trusts of the other share were still subsisting, would not prevent the trustees from exercising the power of sale. In other words, the power of sale is given till all the trusts are exhausted, and till the whole estate is vested in fee in the person or persons entitled.

This is in truth a question of intention, to be discovered from the words of the will, and the Court will execute the intention of the testator, with regard to the power of sale, provided it do not offend against some principle of law.

If

(*a*) 11 *Ves.* 257.

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If a testator expresses his intention that a power of sale should exist in trustees for ever, which is the necessary conclusion in the case I first suggested, this Court will not allow that power to be executed, because it violates the rule against perpetuities. But although *Ware* v. *Polhill* (*a*) was originally supposed to have a wider meaning, if, indeed, Lord *Eldon* intended his decision to have such wider application, what I consider to be left untouched by it, as I have stated, is, that a general power of sale will be good, if it be restricted, either in terms or by inference, to the duration of the trusts, which are within legal limits and which the trustees have to perform: in other words, the duration of the power of sale is to be interpreted from the words used by the testator, and with regard to the duration of the trusts imposed by him.

Regarding then the question in this light, I have first to consider what, in this case, was the intention of the testator as to the duration of the power of sale he gave, and next, whether this intention can properly be allowed by the Court to be executed. I think the intention clear; the estate is given in five-fifths, two of them in settlement to husband and wife for their lives in succession, with remainder to their children, with a gift over in case of no children, and the remaining fifths are given to persons in fee. The power of sale is unlimited and overrides the whole estate. I think that the testator intended the power of sale to last as long as any one of the trusts relative of the two-fifths which were settled remained to be performed; and that, accordingly, he intended it to endure as long as the trusts of Mrs. *Taite's* share remained to be performed: for, if not, why did he give the power at all, or why did he not confine the

(*a*) 11 *Ves.* 257.

the power to the two-fifths which were settled? I think this conclusive, that the testator intended the power to continue a subsisting power, as long as any trust remained to be performed with regard to any one of the shares.

Is there then any rule of law that would be violated by my holding the power to be still subsisting? I am of opinion that there is not: the trusts are within the proper limits in point of time, and if the power cannot now be exercised conformably with the intention of the testator, then it could never have been exercised, and it was originally invalid. But I entertain no doubt that the circumstance of three of the shares being given in fee did not prevent the testator from giving to his trustees a power of sale, limited to take effect over the whole of the property, as long as the trusts of any other of the shares remained to be exercised, any more than if he had given the whole of the shares in fee he might have given a power of sale to be exercised within twelve months after his decease.

This view I think consistent with all the decisions. It is clearly supported by the case of *Trower* v. *Knightley* (*a*); it is a necessary consequence from the principles laid down in the very able decision of the Vice-Chancellor *Wood* in *Lantsbery* v. *Collier* (*b*); and, in my opinion, it is perfectly consistent with the case of *Wolley* v. *Jenkins* (*c*); in fact, the decision in that case proceeded on the assumption, that the power of sale remained as long as there were any trusts of the settlement to be performed, but that when they were over, the power was gone also: the question to be determined there was, whether

(*a*) 6 *Madd.* 134.
(*b*) 2 *K. & J.* 709.
(*c*) 23 *Beav.* 56.

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whether the trusts of the settlement to be performed by the trustees of it were not gone when the tenants for life were all dead, and the persons entitled in remainder were either dead or had never come into existence, and the ultimate gift over had vested in the persons last named—whether the power of sale was subsisting when all this had occurred, simply because a jointure charged on the estate by the settlement and secured by a term which was vested in trustees other than those of the settlement was still subsisting. Accordingly it was there decided, that the trusts of the settlement, for which the power of sale was given, were exhausted, and, consequently, that the power of sale was gone with them.

Here the trusts are not exhausted, they are still subsisting as to one-fifth. The power was good while the trusts of three-fifths were subsisting, why is it not also good and capable of being exercised while the trusts of two-fifths are still subsisting; and, if so, why not while the trusts of one-fifth are still subsisting?

It is true, that the exercise of the power converts the shares of each person from realty to personalty, but this would have been the result whenever the power was exercised, and it is to be observed, that the exercise of the power defeats the interest of no existing person in the fund or the estate, although it may alter its subsequent course of devolution.

I therefore think that the power is still subsisting, and that it may now be exercised.

NOTE.—*See* 2 *Sugden on Pow. ch.* 18, *sect.* 15; 1 *Chance on Pow.* 119; *Jarman on Wills*, 236 (2*nd ed.*); *Lewis on Perpetuities*, 541.

DE WINTON *v.* THE MAYOR &c. OF BRECON.

1858.
July 8, 29, 30.
1859.
Jan. 25, 26, 27.

Where an Act of Parliament authorizes a corporation to mortgage its tolls, &c. this Court has jurisdiction to appoint a Receiver of them, though no such express power is given by the Act. But the Receiver over such property ought not to have committed to him any powers of management which ought properly to be exercised by the Corporation itself.

Where one clause of an Act of Parliament directs specific acts to be done, but which acts would be included in the general terms of a subsequent prohibitory clause, the former clause is not controlled by the latter.

An Act of Parliament gave a corporation compulsory powers of purchasing land to make a market. The 29th section required it to sell the surplus not wanted, and to give certain parties a right of pre-emption, the produce to be applied "to the purposes of the Act." The 30th section gave the corporation power to borrow on debenture, the 32nd power to mortgage or sell any of its land "for the purposes of the Act," and the 83rd section provided that the Act should not empower the corporation to sell without the approbation of the Lords of the Treasury. *Held*, that the 32nd section did not authorize a mortgage of the surplus land for the purposes of the Act, but that it must be sold as directed by the 29th section. *Held*, also, that a mortgage only of the lands of the corporation required the assent of the Lords of the Treasury.

Debenture holders under the Act were to be entitled *pari passu*. One debenture holder attempted to obtain an advantage over the rest by means of an additional mortgage. *Held*, that it was invalid.

IN 1838, it being deemed expedient to erect a new market in the town of *Brecon*, the Corporation obtained an Act of Parliament enabling it to effect that purpose.

This Act (1 *Vict.* c. xii) gave to the Corporation the usual compulsory powers to purchase the necessary lands, and authorized it to erect the market with the necessary conveniences; but the 29th section "required" the Corporation, within seven years after the passing of the Act, to sell the surplus of the land purchased under the Act, and which might not be required, and it gave a right of pre-emption to the persons from whom it had been purchased by the Corporation, or the owners of the adjoining land. The money produced by such sale was to be applied "to the purposes of this Act."

The 30th section empowered the Corporation to borrow money, for the purposes of the Act, upon "the tolls, rents and stallage" of the market, and execute debentures,

1838.

De Winton v. The Mayor &c. of Brecon.

debentures in the form prescribed, by which the Corporation purported to assign to the lender "such proportion of the tolls, rents and stallage" arising under the Act as the sum advanced bore to the whole sum borrowed. And by this section, the debenture creditors were to be entitled to the tolls, &c. equally, "without any preference in respect of the priority of advancing such moneys," or the dates of their debentures.

The 32nd section empowered the Corporation "to raise or borrow, for the purposes of this Act," on mortgage of any messuages or tenements, lands or hereditaments vested in or belonging to the said "Corporation," or any part or parts thereof, or, for such purposes, absolutely to sell, convey and dispose of any messuages, lands or hereditaments belonging to them as aforesaid."

Such sales and conveyances were (by sect. 33) to be under the common seal, and to be in a particular form stated, and the section proceeded in these terms:—"and every such sale and conveyance, so made and executed, shall be valid and effectual to all intents and purposes, and shall be sufficient in law to vest the property of and in any messuages or tenements, lands or hereditaments in the purchaser or purchasers thereof, as the case may be, any law, statute, usage or other matter or thing to the contrary notwithstanding."

By section 34 it was enacted, "that the said mayor, aldermen and burgesses should and they were thereby directed to apply the money to arise or to be received by virtue of the said Act, and, subject as therein mentioned, the tolls, rents and stallage thereby authorized to be taken, in manner following:"—after paying the costs of obtaining the Act and of fitting up the market, in the next

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next place to retain such sums of money as, with the rents, tolls and dues which should be received by the said mayor, aldermen and burgesses from any property belonging to them (other than the tolls, rents and stallage authorized to be taken by the said Act), should be equal in amount to, or necessary to make up, the annual sum of 210*l.* (the amount of the nett annual income of the said mayor, aldermen and burgesses from the whole tolls of the said borough and other property of or belonging to them), of which sum of 210*l.* a competent part should be applied by the said mayor, aldermen and burgesses towards defraying the interest of any incumbrance then affecting their said property, and the remainder should be by them applied to such purposes and in such manner, as they were by law then authorized and empowered to apply their said nett annual income, and afterwards, the said surplus tolls, rents and stallage should be applied in paying the interest of all moneys which should be borrowed under and by virtue of and for the purposes of this Act, and subject to the said costs, charges, expenses and payments aforesaid, the residue of the same surplus tolls, rents and stallage should be divided into two equal moities or equal parts or portions, one of which should be paid unto and among the persons entitled to any of the securities for the money to be borrowed on mortgage as aforesaid, and their respective executors, administrators and assigns, as the case might be, in proportion to the respective sums advanced by him, her or them, without any preference by reason of the priority of date of any such mortgage or on any other account whatsoever, and the other moiety of the said residue of the surplus tolls, rents and stallage should be retained by the said mayor, aldermen and burgesses towards enabling them to pay off (in manner thereinafter mentioned) the said money borrowed on mortgage, and after payment thereof, the whole

1854.

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[illegible] of the said surplus tolls, rents and stallage should be by them applied to such purposes of public benefit within the said borough as to them should seem meet.

By section 17 the Corporation was required to make true accounts of all moneys received and expended by them in the execution of the Act, which were to be open to public inspection.

The 4-th section authorized the Corporation to let the stalls, &c. of the market for any term not exceeding three years.

And the 8th section provided "that nothing in the said Act contained should extend, or be construed to extend, to enable the mayor, aldermen and burgesses of the said borough of *Brecon* to take, appropriate, use, sell, demise, mortgage or alienate, for the purposes of the said Act, without the approbation of the Lords Commissioners of Her Majesty's Treasury, or any three of them, any messuages, lands, tenements or hereditaments which they could not have taken, appropriated, used, sold, demised, mortgaged or alienated without such approbation before the passing of the said Act, anything in the said Act to the contrary notwithstanding."

The Corporation proceeded to put the Act into execution: it purchased the necessary lands, and amongst them premises called "*The Queen's Head;*" it borrowed large sums on debentures, and erected the market, which was opened for public use in 1840.

The Plaintiff was the owner of five of these debentures of 100*l.* each.

Part of the property purchased under the Act, viz., *The*

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The Queen's Head, though not required for the purposes of the Act, had not been sold by the Corporation as required by the 29th section.

In *March*, 1840, the Defendant Mrs. *Payne* advanced the Corporation 1,500*l.* to enable it to complete the market, which sum the Corporation secured by three debentures of 500*l.* each, charged upon the tolls, and a mortgage dated the 4th *March*, 1840, under the corporate seal, whereby the Corporation conveyed *The Queen's Head* and the ground on which the new market was then being erected, and the erections thereon, by way of mortgage for 1,500*l.*, with a power of sale both over the debentures and premises. This mortgage was made without the consent of the Lords of the Treasury, under the 1 *Vict.* c. 12, s. 83, and 5 & 6 *Will.* 4, c. 76, s. 94.

Interest on the Plaintiff's debentures having been in arrear since 1851, he instituted this suit against the Corporation of *Brecon* and Mrs. *Payne*, alleging various neglects, defaults and acts of mismanagement on the part of the Corporation. The bill prayed :—

1. That *The Queen's Head*, and all other hereditaments purchased by the said Corporation under the Act, and not required for the purposes thereof, might be sold, and that the proceeds of such sale might be applied under the direction of this Court.

2. That an account might be taken of the property and estate of the Corporation at the time of passing the Act, and also at the present time; and of all sales and purchases under it, and of all moneys received by the Corporation from any such sales; and also a like account of the rents of the property of the Corporation received since the passing of the Act; and of all tolls, rents and stallage

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stallage received by the Corporation in pursuance of the Act, and their application thereof.

3. That a Receiver might be appointed of "the rents, issues and profits of the estate and hereditaments" of the Corporation, and of the tolls, rent and stallage, and other moneys payable under the Act, and that the Receiver might "be authorized, from time to time, to let the same corporate estates and hereditaments, and also the stalls, shops, standing-places, shambles, benches and other conveniences in the several markets in the said Act mentioned, and generally to exercise the powers of the said Act, or otherwise that the powers and provisions of the said Act might be exercised under the direction and control of this honorable Court."

4. That the rents, issues and profits, tolls, rents and stallage might, from time to time, be applied, under the direction of the Court, in accordance with the provisions of the Act.

July 8. A motion was now made for a Receiver, in the terms of the third paragraph of the prayer of the bill.

Mr. *R. Palmer* and Mr. *Hardy* for the Plaintiff. The interest of the debentures is greatly in arrear, and the non-payment has been caused by the culpable mismanagement of the Corporation. This Court ought, therefore, to interfere by the appointment of a Receiver and manager of the property charged. In *Ames* v. *The Trustees of the Birkenhead Docks* (*a*) the Court held, that in such a case a debenture-holder was entitled to a Receiver. The debenture-holders have an interest in the general property of the Corporation, and the Corporation are giving judgments on which *elegits* will issue against

(*a*) 20 *Beav.* 332.

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against the corporate property, to the prejudice of the rights and remedies of the existing incumbrancers; this renders it the more necessary that a Receiver should be appointed for their protection.

Mr. *Follett* and Mr. *C. C. Barber*, for the Corporation, said, that the real contest in this case was between judgment creditors for priority, and that one had already obtained a judgment on which an *elegit* had issued, which had been lodged with the sheriff. That the object of the Plaintiff was, in the absence of the creditor, to prevent his obtaining the benefit of his diligence, by inducing the Court to take possession of the corporate property liable to satisfy the judgment.

The MASTER *of the* ROLLS.

I can only grant a Receiver of the tolls, dues and stallages, and of any sums due or to become due in respect thereof, until the further order of the Court. I will reserve the remainder of the motion until next seal day, with liberty to the Defendant to move to discharge the present order.

Notice must be given to the judgment creditor of the order, and that he will be at liberty, though not a party to the cause, to appear on the hearing of the motion, or to give such notice of motion to discharge or vary the present order as he may be advised. I suppose the Plaintiff will consent to that.

Mr. *R. Palmer* assented.

The Corporation and *William Parry*, the judgment creditor, *July* 29.

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creditor, on the 10th of *July*, gave notice to discharge the order for a Receiver.

Mr. *Follett* and Mr. *C. C. Barber*. This case differs from *Ames* v. *The Trustees of the Birkenhead Docks* (*a*) and *Potts* v. *The Warwick, &c. Canal Company* (*b*), for there the Corporation consented to the Receiver. Here the Corporation is the first incumbrancer in respect of the 210*l*. a year, for the debentures are expressly made subject to its priority of payment and to the application of the tolls as mentioned in the Act. The possession, therefore, of the first incumbrancer ought not to be interfered with at the suit of a *puisné* incumbrancer.

The Corporation have public duties to perform in respect of its property, and to which Plaintiff's rights are postponed by the Act; these cannot be delegated to the Receiver. The Corporation alone can appoint collectors, inspectors and other officers, and settle their allowances (sect. 38). They are to fix the amount of tolls (sect. 42); all acts authorized are to be done at a general meeting of the council of the borough (sect. 51); and there are the powers of management, which are of such a nature as to be incapable of being handed over to a Receiver. In *Ames* v. *The Trustees of the Birkenhead Docks*, the Court avoided the difficulty, by continuing the management, and appointing the Receiver merely of the balance after payment of the outgoings necessary to carry on the concern. Hence the order should only extend to the surplus, after paying all prior charges.

The Corporation have municipal duties to perform out of the rents; by stopping them it will be prevented performing

(*a*) 20 *Beav.* 332. (*b*) 1 *Kay*, 142.

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performing important public duties, for the non-performance of which the Corporation may become liable, and it will become necessary to enforce a borough rate on the inhabitants to meet the deficit.

The tolls have fallen off, and this alone has prevented the payment of the interest, but no such mismanagement has been proved as to authorize the appointment of a Receiver, and the Act of Parliament gives no power to appoint one.

Mr. *Selwyn*, for *Parry*, the judgment creditor, also opposed the appointment of a Receiver.

Mr. *R. Palmer* and Mr. *Hardy* were not heard, but they referred to *Fripp* v. *The Chard Railway Co.* (*a*); *Arnold* v. *The Mayor of Gravesend* (*b*).

The MASTER *of the* ROLLS.

I think that the Plaintiff is entitled to a Receiver. I do not think it necessary that the Act of Parliament should give this Court a power to appoint a Receiver to enable the Court to do so; where an Act authorizes a mortgage, it authorizes, as incident to it, all necessary remedies to compel payment, and in the case of tolls, a power to this Court to appoint a Receiver.

I cannot accede to the argument that the Corporation is the first incumbrancer, and entitled to possession. The Corporation is the mortgagor; and I regard it in the same situation as if the owners of an estate had mortgaged it subject to a ground rent payable to a superior landlord.

There

(*a*) 11 *Hare*, 241. (*b*) 2 *Kay & J.* 574.

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There is one point necessary to consider, namely, the terms of the order. The debentures are subject to the priority of payment, given by the 34th section to the Corporation, to have such a sum of money paid to it as, together with the rents of the other property of the Corporation, shall amount to 210*l.* a year. If the Act had specified the amount as 210*l.* the course would be very plain; but it is such a sum as, with the rents, &c., of its other property, shall amount to 210*l.* a year. The consequence is, that this may involve an annual account, and the only way I can get over the difficulty is, by giving liberty to apply, and by giving liberty to the Receiver out of the first tolls, &c., to pay the Corporation such a sum as, together with the rents from its other property, will make up 210*l.* a year.

Mr. *R. Palmer*. As they shall state by affidavit.

The MASTER *of the* ROLLS.

As the Act authorizes a mortgage of the tolls, I have no doubt that this Court will appoint a Receiver; but I do not think I can give to the Receiver such power of management of the affairs of the Corporation as would make them liable to proceedings by the Attorney-General by *mandamus*, or the like. I am not aware whether the letting by the Receiver instead of the Corporation would have that effect; but, if it would, then the letting should be by the Corporation, but the rents should be received by the Receiver.

1859.
Jan. 25, 26, 27, 31.

The cause now came on for hearing.

Mr. *R. Palmer* and Mr. *Hardy*, for the Plaintiff.

Mr.

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Mr. *Follett* and Mr. *C. C. Barber*, for the Corporation.

Mr. *Eddis* for the executors of *Payne*, who had died in the interim.

Lord Crewe v. *Edleston* (*a*); *Payne* v. *The Mayor of Brecon* (*b*), were cited.

The MASTER *of the* ROLLS.

I do not think it necessary to hear a reply. The only question is, whether Mrs. *Payne's* mortgage is good as against the Plaintiff and the other debenture creditors: and, upon the construction of this Act of Parliament, I am of opinion that it is not. I hold that where an Act of Parliament contains two sets of provisions, one giving specific and precise directions to do particular things, and the other, in general terms, prohibiting certain acts, which would, in the general sense of the words used, include the particular acts before authorized, then the general clause does not control the specific enactments. For instance, if an Act of Parliament authorized a corporation to sell a particular piece of land, and by a subsequent general clause in the act it was declared, that nothing therein contained should authorize the corporation to sell any land, the general clause would not control the particular enactment, which would take effect, notwithstanding the prior exception was not clearly and distinctly expressed in the general clause. I so held in another cause (*c*), on the authority of many cases cited to me. If the Court finds a positive inconsistency and repugnancy in the clauses of an Act of Parliament, it may be difficult

(*a*) 1 *De Gex & J.* 93.
(*b*) 3 *Hurl. & N.* 572.
(*c*) *Petty* v. *Solly*, 15 *Feb.* 1858.

[illegible]

[illegible]

[illegible] to deal with the case at all, but as far as it can, it must give effect to every clause in it. I find, in this act of Parliament an authority to buy certain lands for the purposes of the act, and if more lands are bought than are required for those purposes, then the act requires and [illegible] the Corporation to sell such surplus lands within seven years (s. 29). The act next authorizes the Corporation to borrow, for the purposes of the act, any money on mortgage of its property generally, or for such purposes "to sell, convey and dispose of" any of its property. My opinion is, that this general clause must be read consistently with the 29th clause, which directed particular lands of the Corporation to be sold in a particular manner, and this general clause must be construed to apply to the rest of the land of the Corporation. The effect of this standing alone would be to overrule the 94th section of the Municipal Corporation Act (5 & 6 Will. 4, c. 76), as applicable to this Corporation, but I find that by the 83rd section of the 1 *Vict.* c. xii. the provisions of section 94 of the Municipal Corporation Act, imposing fetters on alienation by municipal corporations of their land, are repeated for the purpose of this Corporation. And it is directed that they shall have no power to alienate for the purposes of this act, except with the sanction of the Lords of the Treasury, any hereditaments which they could not alienated without such approbation before the passing of it. Unless, therefore, they were at liberty to part with this land before the passing of this act, I must hold that this applied not to the 29th section, but applies to that which is included in the 32nd section, and that the sanction of the Lords of the Treasury must previously be obtained, in order to ascertain that it is for the legitimate purposes of the act that they require to sell.

Mr. *Eddis* argued, that under the 32nd section there is

is power to mortgage any lands for the purposes of the act, and that this will include the surplus lands, so that the 29th clause relating to the sale of the surplus lands will only apply to so much as shall remain after they have been mortgaged for the purposes of the act. But it is to be observed, that the 29th section itself directs, that the surplus land shall be sold *for the purposes of the act*. The effect of such a construction as that suggested, would be to overrule the 29th section, which directs the Corporation, for the purposes of the act, to sell this surplus land in a particular way. Can the Corporation under the 32nd section mortgage that land to a stranger, and authorize him to sell it in any manner he pleases? The whole provision of the 29th section would be then put an end to. Suppose the Corporation, for some purpose or other, wanted expressly to get rid of this obligation, and wished that the person from whom they had purchased should not have the option of repurchasing the surplus land, they might, according to the argument, mortgage it to a stranger, with a power of sale, to anybody he pleased, and thus defeat the object of the Act of Parliament. It is impossible that such can be the construction of these two clauses taken together.

But it appears to me that there is a construction which renders the whole consistent, viz.:—That with respect to so much of the land bought by the Corporation for the purposes of the act as is not wanted for that purpose, you shall sell it in a particular manner, and give to your vendor the right of pre-emption; and as to your other lands, you may mortgage, alienate or sell them, as you think fit, for the purposes of the act; provided always, that nothing in this act shall enable you to exercise this latter power except with the sanction of the Lords of the Treasury, who are to be guardians, and

are

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are to ascertain that you do sell *bonâ fide* for the purposes of the act.

If this be the construction of the act, the different clauses are perfectly clear and consistent.

Again, the object of the 30th section, as was very fairly and properly admitted, was to place all debenture holders on an equal footing. The Plaintiff advanced money upon the security of these tolls, for the purposes of the act, and Mrs. *Payne* did the same, but in order to defeat this clause, and obtain a priority, she contracts with the Corporation for a mortgage upon their other property. This would manifestly give her a great advantage over the other debenture holders, and, in my opinion, she did not, by taking this additional security, acquire priority.

I think, therefore, on both these grounds, that as against the Plaintiff, there is not a valid mortgage, which will give her any priority over the Plaintiff in the present suit.

I express no opinion as to what rights Mrs. *Payne* may have against the Corporation, as between them a very different question may arise. But as regards the Plaintiff, who was no party to the mortgage transaction, I find nothing to fix upon him any personal equity, or to enable any one to urge as against him that he having been a party to an act which cannot be supported, it does not lie in his mouth to take the objection.

As against the Plaintiff, therefore, and the debenture holders, I am of opinion that Mrs. *Payne* has obtained no priority, and I must make a declaration to that effect.

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effect. That leaves untouched the question of the liability of the Corporation under the covenants to pay, and any personal equity against the Corporation.

The 29th clause contains an imperative direction that the Corporation shall sell the surplus land within seven years after the passing of the act. They have not done so, and it is difficult to say that any person interested in the performance of this act may not now enforce that sale. If it is insisted upon, I am of opinion that the Plaintiff is entitled to have it sold, though I doubt whether it would, at the present time, be for his benefit. But with such an express and positive declaration that the sale shall be made, I am somewhat apprehensive, whether I am entitled, even with the consent of the parties, to refrain from enforcing this compulsory clause. As to this I should be glad to be assisted by a reference to any case in which a similar matter has been dealt with. The disposition of the Court undoubtedly would be to do that which would be most beneficial to all parties concerned.

I must continue the Receiver of the tolls, rents and stallages of the market, but of nothing else. At the close of every year the Corporation will give a detailed accounts of their receipts for the purposes of this act, and under the act.

1839.

THE MAYOR, &c. OF BRECON v. SEYMOUR.

March 4, 5, 8.

Two sums were due to A. from B., one on mortgage of lands, and the other by covenant. A. having brought action for both sums, B. paid the amount due on the mortgage into Court. A. took this sum out of Court, and he proceeded in the action and recovered a judgment on the covenant.

Held, that the mortgage having been satisfied before the judgment had been obtained, A. had no right to tack his judgment.

Whether a judgment against a municipal corporation operates as an equitable mortgage on its lands, the Municipal Corporation Act forbidding a mortgage, except with the assent of the Lords of the Treasury, quære.

IN *July*, 1835, this Corporation executed a valid mortgage of its corporate estate and tolls for securing a sum of 750*l*. Afterwards (*September* 9th, 1835), the Municipal Corporation Act (5 & 6 *Will.* 4, c. 76) passed, by the 94th section of which municipal corporations were forbidden to "sell, mortgage or alienate the lands, tenements or hereditaments of the said body corporate," except with the approbation of the Lords of the Treasury.

Subsequently to this, on the 9th of *May*, 1838, the act of the 1 & 2 *Vict.* c. xii, passed, which authorized the Corporation of *Brecon* to make new markets. The principal provisions of this act are stated *ante* (*a*), but the effect of them is as follows:—It gave the Corporation compulsory powers to take the requisite lands; but it required it, within seven years, to sell the surplus taken and not required. It authorized the Corporation to borrow money on debentures for the purposes of the act, charging the tolls, rents and stallage, and to sell or mortgage. But the 83rd section provided as follows:—"That nothing in the said act contained should extend, or be construed to extend, to enable the mayor, aldermen and burgesses of the said borough of *Brecon* to take, appropriate, use, sell, demise, mortgage or alienate for the purposes of the said act, without the approbation of the Lords Commissioners of her Majesty's Treasury, or any three of them, any messuages, lands, tenements or hereditaments which they could not have

(*a*) *De Winton* v. *The Corporation of Brecon*, *ante*, *p.* 535.

have taken, appropriated, used, sold, demised, mortgaged or alienated without such approbation before the passing of the said act, anything in the said act to the contrary notwithstanding."

The Corporation raised large sums, and erected the market.

By indenture of the 4th of *March*, 1840, the mortgage of 750*l.* was transferred to *Payne*, and on the same day the Corporation, but without the consent of the Lords of the Treasury, conveyed the property acquired under the Market Act to *Payne*, by way of mortgage, to secure 1,500*l.* and interest. This deed contained a covenant, on the part of the Corporation, to pay the mortgage money.

The money not having been paid, *Payne*, in 1857, brought an action against the Corporation to recover the two sums of 750*l.* and 1,500*l.* and interest. The Corporation paid the 750*l.* and interest into Court, and as to the 1,500*l.*, pleaded the invalidity of the mortgage deed of the 4th of *March*, 1840, it not having been made with the approbation of the Lords of the Treasury. The Plaintiff, *Payne*, took the 796*l.* 15*s.* out of Court, and as to the 1,500*l.*, the Court of Exchequer held, that although the mortgage might be *ultra vires*, the covenant to pay was valid (*a*).

The Corporation instituted this suit against the executors of *Payne* to obtain a re-conveyance of the mortgaged property, and delivery of the title deeds. The Defendants insisted that they had a right to tack their judgment debt to the first mortgage security.

Mr.

(*a*) *Payne* v. *The Mayor of Brecon*, 3 *Hurl. & N.* 572.

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Mr. *Follett* and Mr. *C. Barber* for the Plaintiff. The Defendants have no right to tack; for, at the time the judgment was obtained, the only valid mortgage was satisfied. Secondly, on the principle laid down by this Court in the case of *De Winton* v. *The Corporation of Brecon*, the mortgage for 1,500*l.* is invalid, both against the debenture creditors and the Corporation. Thirdly, the judgment cannot affect the lands of the Corporation; for, otherwise, an equitable mortgage might be created by a municipal corporation without the assent of the Lords of the Treasury, notwithstanding the prohibitory clause in the Municipal Corporation Act (5 & 6 *Will.* 4, c. 76, s. 94). This was decided in the cases of *Arnold* v. *Ridge* (*a*), *Ex parte the Corporation of Hythe* (*b*).

The Act of Parliament would, by such means, become inoperative, and the intention of the legislature defeated. If the judgment does not affect the land, it cannot, under any circumstances, be tacked. Municipal corporations now hold their corporate property merely in trust; and they, therefore, cannot, on the common principle, mortgage the trust property.

Mr. *O. Morgan* for *Parry*.

Mr. *R. Palmer* and Mr. *Eddis* for the executors of *Payne*. First, the invalidity of the 1,500*l.* mortgage was not decided in *De Winton* v. *The Corporation of Brecon*. That case only determined that it was inoperative, as between the mortgagee and the debenture creditors; but the Court expressly reserved the question of

(*a*) 13 Com. B. R. 745. (*b*) 4 *Y. & C.* 55.

of personal equity and liability as against the Corporation who cannot now set up the invalidity of its own act.

Secondly, the concurrence of the Lords of the Treasury was not necessary to render this mortgage valid. Under the 83rd section of the 1 *Vict.* c. xii, there is a distinction between the lands belonging to the Corporation prior to that act, and lands afterwards acquired. The first could only be alienated, under the Municipal Corporation Act, with the assent of the Lords of the Treasury; but the second were unaffected by the 83rd section of the 1 *Vict.* c. xii. The words "take, appropriate, use," which precede the words "sell, demise, mortgage or alienate," conclusively shew that such must be the proper construction of the clause; for otherwise the Corporation could neither *take* lands, nor *use* them in any way, without first obtaining the consent of the treasury, though the act empowers them to take the lands in the schedule without any such consent, and to use them as a site for the market. The mortgage for 1,500*l.* is, therefore, valid as against the Plaintiffs.

Thirdly. But there is clearly a valid debt, under the covenant, as against the Corporation to whom the money was advanced; *Holdsworth* v. *The Corporation of Dartmouth* (*a*); *Pallister* v. *The Corporation of Gravesend* (*b*). On the debt a judgment has been obtained, to which is attached the ordinary remedies for enforcing it; and where there is no fraud or collusion, it must, under the 1 & 2 *Vict.* c. 110, constitute an equitable charge on the lands of the Defendant; *Arnold* v. *The Corporation of Gravesend* (*c*), from which case

(*a*) 11 *Ad. & E.* 490.
(*b*) 9 *Com. B. Rep.* 774.
(*c*) 2 *Kay & J.* 574.

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case it is evident that the Vice-Chancellor *Wood* did not concur in the decision in *Arnold* v. *Ridge* (*a*). A corporation can contract debts, and must therefore be liable to the ordinary process of the Court to compel payment. The judgment is neither a sale nor a mortgage by the Corporation, and the act says, that municipal corporations are not to "sell, mortgage," &c.; the House of Lords has decided, in *Croft* v. *Lumley* (*b*), that a warrant of attorney on which judgments were afterwards entered up did not come within a covenant not to "charge or encumber" &c., "by mortgaging the same, or granting any rent-charges or other encumbrances whatever."

There is a great distinction between a voluntary judgment and one *in invitum*; *Doe* d. *Mitchinson* v. *Carter* (*c*); the latter cannot be considered a mortgage or an alienation by a corporation, so as to require the assent of the Lords of the Treasury. As the Defendants have the legal estate, and an equitable charge on the land, they cannot be compelled to part with their security until full payment. They also cited *Alexander* v. *Brune* (*d*).

Mr. *Follett*, in reply, cited *Hawkins* v. *Gathercole* (*e*).

The Master *of the* Rolls.

I think it follows, from my decision in *De Winton* v. *The Corporation of Brecon*, that the Plaintiff is entitled to a decree. The bill is filed for the reconveyance of land, and the delivery up of title deeds, upon payment of

(*a*) 13 *Com. B. Rep.* 745.
(*b*) 6 *H. L. Cas.* 672.
(*c*) 8 *Term Rep.* 57.
(*d*) 7 *De G., M. & G.* 525.
(*e*) 6 *De G., M. & G.* 1.

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of a mortgage. The Defendants insist that they have a right to detain these deeds by reason of their having another incumbrance upon the land of the mortgagors. The state of the case is shortly this:—The first mortgage, for 750*l.*, was made in 1835, and was not affected by the Municipal Corporation Act, which passed in the same year. By this mortgage, a sum of 750*l.*, advanced by Mr. *Vaughan*, was secured upon the corporate property. In 1840, this mortgage was transferred to Mrs. *Payne*. With respect to the validity of that mortgage, no question arises. On the same day, in 1840, a second and separate and distinct mortgage, for 1,500*l.*, was made to Mrs. *Payne*. I do not go into any question respecting the rights of the debenture or bond holders under the Market Act; but in *De Winton* v. *The Mayor of Brecon*, I held that this second mortgage was invalid, that, by the 94th section of the Municipal Corporation Act, a corporation was prohibited from raising money upon their property, and that the 83rd section of the Market Act confirmed and established that prohibition with respect to this property. In *October*, 1857, Mrs. *Payne* brought an action against the Corporation, the declaration contained three counts. The first was on the covenant contained in the market-house mortgage for 1,500*l.*, the second count was *indebitatus assumpsit*, and the third count was for money due on account stated. That was met in this way:—To the first count two pleas were pleaded, one *non est factum*, and the other that the deed was invalid. With respect to the second and third counts, a plea was put in, by which the amount that was claimed to be due upon the first mortgage was paid into Court. That was taken out by Mrs. *Payne*, in satisfaction of the causes of action in respect of that third plea, that is, in respect of the whole declaration except what was claimed upon the covenant contained in the deed of mortgage of the market-house.

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In that state of things the matter came on before the Court of Common Law, which held that the covenant was perfectly good, although the mortgage of the property was invalid.

The question therefore which now arises is, whether, as all that was due on the first mortgage has been paid, the mortagee has any right to resist the usual equity of a mortgagor, in such a case, to have a reconveyance of the land and the delivery up of the title deeds. This is resisted by the Defendants, upon the ground that there is a right to tack, but it is clear that no such right can exist. No doubt a judgment may be tacked to a mortgage, but here the mortgage was paid off and had ceased to exist before the judgment had been recovered, and, therefore, there was never any mortgage to which any existing judgment could be tacked. As soon as the money due on the mortgage was taken out of Court, or if there had been a tender of the total amount due on the mortgage, it would have been the same thing, the right of the mortgagor arose to have both the land reconveyed and the title deeds delivered up. If the mortgage for 750*l.* was valid, but by the effect of the statute the mortgage for 1,500*l.* was invalid, except as it operated as a deed of covenant, then, when the first mortgage had been paid off, it became impossible, as between individuals, for the mortgagee to resist the right of the mortgagor to have a re-conveyance of his land and the delivery up of the title deeds, upon the ground that there was a covenant by him to the mortgagee, relating to a separate and collateral matter, upon which the mortgagee was bringing or had brought an action, and which might ripen into a judgment, which might operate as a lien upon the land.

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The principal argument, founded upon the construction of the Act of Parliament, is, in my opinion, covered by what I formerly decided in the case of *De Winton* v. *The Mayor of Brecon* (*a*), but the more I look at it, the more I am confirmed in that view of the case. In fact, the 29th and the 32nd clauses of the Market House Act must be read together and made consistent. I think it impossible to put upon the 83rd section the construction, that the words prohibiting alienation without the consent of the Lords of the Treasury are to be limited to the property it then possessed, and not affect subsequently-acquired property. The way in which I read it is this:—The Municipal Corporation Act, then already passed, forbids corporations alienating their property without the approbation of the Lords of the Treasury; then comes the 83rd section, which says, "that nothing contained in this act shall authorize them to do what they could not have done without it," consequently, except where there are specific and precise provisions and enactments authorizing particular things to be done, it leaves them exactly as they were before, and the prohibition against alienation extends, therefore, not merely to the existing lands of corporations, but to any land which they may acquire thereafter.

As against an individual, it is undoubtedly true that a judgment would ripen into a lien and charge upon his land, but a question arises whether that can be the effect of a judgment against a corporation. I do not think it necessary to go into that question, or decide what will be the effect of the judgment recovered against the Corporation, and whether a distinction can be made between a judgment *in invitum* and a judgment which is confessed or not resisted. Certainly, if a corporation

(*a*) *Ante*, p. 535.

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tion has borrowed money, and has no defence to an action brought to recover the amount, it is difficult to see how they can be in a better situation by resisting the action, and putting the creditors to the useless expense of obtaining the verdict of a jury, than they would be if they had made no defence, and allowed the judgment to go by default. But if a judgment against a corporation affect their estate in the same way as it does that of individuals, it is clear that in that way corporations can alienate their property to any extent they may think proper, inasmuch as if the judgment can be enforced against the lands of a corporation, they may be charged in that form instead of by a mortgage deed. I think it unnecessary to go into that question, because I am of opinion that I must now treat the market-house mortgage as nothing more than a deed of covenant; and, the only mortgage that did exist having been paid off, the mortgagor's right to have the title deeds and the reconveyance immediately arose, notwithstanding the judgment under the deed of covenant. In giving judgment in *De Winton* v. *The Mayor of Brecon*, I made an observation with respect to a personal equity, but a personal equity cannot arise against a corporation. The members of the Corporation may have induced persons to lend money to the Corporation, and by reason of having so induced them, and by having made promises to the persons who advanced the money, they may become personally liable to the lenders, but to a corporation the words "personal equity" do not apply, and it is impossible that the Corporation itself can be deprived of a defence which, but for the personal misconduct of some of its members, would have been admissible. I am of opinion, therefore, that Plaintiff is entitled to a decree for a reconveyance of the lands and the delivery up of the title deeds, with costs.

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GEORGE *v.* WHITMORE.

Jun. 31.

The Court will not, before the hearing, direct a case to be heard before a jury under the 21 & 22 *Vict.* c. 27, s. 2, if one party opposes it.

IN this case, the answers had been put in, but nothing more had been done.

It was now moved, on behalf of the Plaintiff, that it might be ordered that the following questions of fact, arising in this suit [stating them] might be tried before his Honor by a common jury.

Mr. *W. Morris*, in support of the motion, argued that this was a proper case for the application of the powers contained in the recent Act (21 & 22 *Vict.* c. 27, s. 2), inasmuch as there were questions of fact to be tried, as to which there must necessarily, under the circumstances, be a conflict of testimony. That it would be incurring a very useless expense to enter into evidence as to the facts, in the usual way, if they must afterwards be tried by a jury and on a re-examination of the same witnesses in Court.

Mr. *De Gex*, for the Defendant, being asked by the Court whether he assented, said that he was instructed to oppose the motion.

The MASTER *of the* ROLLS.

My view is this:—If counsel on both sides say they have looked into the case, and that they consider that the Court would have very considerable difficulty in deciding the case without having a jury, I would, in the present state of the business of the Court, order one. I have on former occasions directed an issue without hearing the cause, relying on the state-

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George v. Whitmore.

ments of counsel. It was for that reason that I asked Mr. *De Gex* whether he assented to the course proposed, but he informed me that he opposed it.

I cannot, when the application is opposed by one side, order a jury until I have heard enough of the case to satisfy me that there is difficulty in determining the questions in the cause without the assistance of a jury.

I consider that the object of the late act was this:—The Court, instead of directing an issue, is to have power to have the question tried by a jury before the Court itself, in all cases where formerly it would have directed an issue. A question may now be tried in this Court by a jury, in the same cases in which an issue was formerly directed.

When the application has been opposed, I have never known an issue granted, on the motion of the Plaintiff, before the hearing. I must, however, press very earnestly on the profession, in those cases in which it is reasonbly clear that a jury is the proper tribunal to determine the question between the parties, how desirable it is that they should agree to apply to the Court to try it by a jury at once, and thus avoid the expense of going through the evidence twice, once by affidavit and afterwards orally. I will in such cases give the parties all the facilities in my power. The question is new, and it is desirable that my view should be made known. I can make no order, but the costs of this motion may be costs in the cause.

Note.—*See Peters* v. *Rule*, 28 *L. J., Chan.* 246; *Bradley* v. *Bevington*, 4 *Drew.* 511; *Bonser* v. *Bradshaw*, 4 *Jur.* (*N. S.*) 1011.

1859.

SMITH *v.* ACTON. (No. 2.)

Jan. 31.

An order drawn up in the Registrar's office, in the absence of a Defendant, will not be set aside where no error is shewn.

ON the 1st of *June*, 1858, the Defendants' demurrer was overruled, and on the 14th of the same month, the Plaintiff's solicitor gave the Defendants' solicitor notice that he would attend the Registrar at one o'clock on the 15th, to pass the order overruling the demurrer. The Defendants' solicitor attended at the proper Registrar's, and waited half an hour, but the Plaintiff's solicitor did not appear. Afterwards, on the 16th of *June*, the Registrar drew up the order, without any further notice to the Defendants.

Mr. *Swanston*, jun., for the Defendants, now moved, "that the order, and also the taxation of costs had thereunder, and the certificate (if any) of the Taxing Master, might be set aside for irregularity, for that the Plaintiff or his solicitor did not give to the Defendants or their solicitor due and proper notice, either of the settling of the minutes or draft of the order, or of the passing of the order, and that the minutes or draft of the order were or was settled, and the order passed, without the knowledge and in the absence of the Defendants and their solicitor."

He contended that the proceeding was irregular, and that a second notice ought to have been given. He referred to *Aychburn* (*a*).

Mr. *R. Palmer* and Mr. *J. Sidney Smith* were not heard, but they referred to *Hart* v. *Tulk* (*b*).

The

(*a*) *Pages* 181—183. (*b*) 6 *Hare*, 616.

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The MASTER *of the* ROLLS.

It is quite impossible that I can grant this motion. The time of the Court would be constantly taken up with futile questions on every trifling breach of regularity, and though no injury had been occasioned to any one, they would be made the subject of motion.

It is not alleged that the order as drawn up is not right, or that if a second notice had been given and the Defendants had attended the Registrar the same order would not have been drawn up, and no error in the order, either of form or substance, is suggested.

The only order I can make is, that the Defendants pay the costs of the motion.

LEVI *v.* HERITAGE.

Feb. 23.

A Defendant who has taken the benefit of the Insolvent Debtors' Act may move to dismiss for want of prosecution.

THE Defendant filed his answer on the 24th of *March*, 1858, and he afterwards took the benefit of the Insolvent Debtors' Act (1 & 2 *Vict.* c. 110, s. 75). No proceedings had since been taken on either side.

A motion was now made, on behalf of the Defendant, to dismiss the bill for want of prosecution.

The affidavit of the Defendant's solicitor stated, that he had inspected the schedules in the insolvency, and that it was not admitted or stated, in either of such schedules, that the Plaintiff was or claimed to be a creditor of the Defendant for or in respect of any of the subject-matters

matters sought to be recovered by the Plaintiff's bill in this cause.

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LEVI v. HERITAGE.

Mr. *Haddan*, in support of the motion, relied on *Monteith* v. *Taylor* (*a*), and *Blackmore* v. *Smith* (*b*), where a motion to dismiss had been made by an uncertificated bankrupt, and on *Robson* v. *The Earl of Devon* (*c*).

Mr. *Joyce* for the Plaintiff. An insolvent debtor cannot move, for all his rights are vested in his assignee (*d*). At all events, the bill ought not to be dismissed with costs, for the difficulty in prosecuting the suit has arisen from the Defendant's own act; *Knox* v. *Brown* (*e*); *Blanshard* v. *Drew* (*f*).

The MASTER *of the* ROLLS.

I am bound by the decisions referred to, which I cannot get over. They are clear, that when the Plaintiff does not proceed in the suit, the Defendant, whether an insolvent or not, may move to dismiss for want of prosecution.

I must make the usual order.

(*a*) 9 *Ves.* 615.
(*b*) 1 *Mac. & G.* 80, *and* 1 *Hall & Twells*, 155.
(*c*) 3 *Sm. & Giff.* 227. *See Rhode* v. *Spear*, 4 *Madd.* 51; *Manson* v. *Burton*, 1 *Y. & C.* (*C. C.*) 626; *Smith's Pr.* 208 (*5th ed.*); *Meiklam* v. *Elmore*, 5 *Jur.* (*N. S.*) 904.
(*d*) 1 & 2 *Vict. c.* 110, *s.* 75.
(*e*) 2 *Bro. C. C.* 186.
(*f*) 10 *Sims.* 240; *and see Findlay* v. *Lawrence*, 2 *De G. & Sm.* 303.

1859.

STURGIS *v.* MORSE. (No. 2.)

March 1.

One of several Defendants appealed, substantially, from the whole decree, and the appeal was dismissed with costs. *Held*, on taxation, that the same fees on the Plaintiff's briefs which had been allowed on the original hearing ought to be allowed on the appeal.

Held, also, that the length of the interval between the two hearings ought not to vary the amount.

The evidence taken by any parties to a cause may be used by any of the other parties.

BY the decree made in this cause on the 18th of *November*, 1857 (*a*), it was declared that the Plaintiff, Mr. *Sturgis*, as the assignee in insolvency of *Coningham*, was entitled to the insolvent's share and interest in certain hereditaments, in priority to the Defendants *Pidgeon*, *Judkins*, *Smith*, and the Defendants *Morse* and *Pennell* (as assignees under the bankruptcy of *Coningham*, the insolvent), and it was ordered, that the Defendant *Morse* should pay to the Plaintiff his costs of this suit, so far as the same had been occasioned by his contesting the Plaintiffs' claim to such priority as against himself and *Pennell*; and it was declared that the Defendants *Ling* and *Lucas* were trustees for the benefit of all persons interested in the estate of *Coningham* the insolvent (according to the respective interests) of the security of the 30th day of *June*, 1813; and certain consequential accounts were ordered to be taken, and the bill was dismissed as against *Tebbutt* without costs.

The Defendant *Morse* alone appealed from the decree and asked that the decree, except as to so much thereof as directed the Plaintiff's bill should stand dismissed against *Tebbutt* without costs, might be reversed, and that the Plaintiffs' bill might be dismissed as against himself, *Morse*, with costs.

On the hearing of the appeal on the 24th day of *June*,

(*a*) *See* 24 *Beav.* 541.

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June, 1858, all the other Defendants except *Tebbutt* and *Ling* appeared, and the Lords Justices affirmed the decree with costs (*a*).

In taxing the Plaintiff's costs of the appeal, the Taxing Master disallowed a portion of the fees paid to the Plaintiff's counsel on the appeal, viz.: 44*l.* out of a fee of 100*l.* to the leading counsel, and 23*l.* 5*s.* out of a fee of 77*l.* to junior counsel. The same sums of 100*l.* and 77*l.* were the fees allowed by the Master to them on the original hearing of the cause.

The Taxing Master afterwards reconsidered his taxation, and disallowed the objections carried in thereto; he stated the grounds and reasons for his decision in the following terms:—

"Firstly. Because the fees to counsel on the original hearing were given in respect of the whole case, as it then stood, between the Plaintiff and the whole of the Defendants, and as the appeal *was the appeal of one Defendant only, whose interest was separate and distinct from all the rest*, and the *other Defendants* could not be heard, except to support the decree, I arrived at the conclusion, after having carefully looked through the briefs, that the answers of all the other Defendants (except that of the Defendant *Ling*, which was read by order as an affidavit), and *the evidence and exhibits used* on the *part of those Defendants, were not necessary* for the Plaintiff's counsel on the hearing of the Defendant *Morse's* appeal; and such answers *and evidence*, amounting to upwards *of two hundred sheets*, I feel that the objection taken to the amount of the fees given was a valid one, and I accordingly reduced those fees in proportion

(*a*) 3 *De Gex & Jones*, 1.

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portion to what I considered might and ought to have been the briefs given to counsel on the appeal.

"Secondly. I consider the understanding, that there has existed a rule, that counsel are entitled to the same fees on the argument of an appeal as were given on the original hearing, can only have been applicable to a period when a year and upwards elapsed between the two hearings, and could then only apply to cases where the same briefs were necessarily given. Whereas, in the present instance, the appeal was heard in the term immediately following that in which the decree was pronounced (*a*), a circumstance in itself, in my judgment, a ground for giving less fees than those given on the original hearing, as counsel would not have the labor of making themselves masters of the case as in the first instance."

The Plaintiff presented a petition, praying that it *might be referred back* to the Taxing Master to *review his taxation*, in respect of the items so disallowed, and to vary his certificate accordingly.

Mr. *R. Palmer* and Mr. *Osborne*, in support of the petition, argued, that although the appeal was by *Morse* alone, and though a small portion of the decree was excepted, still, substantially, it was an appeal from the whole decree, and that the whole case was as much open as at the original hearing. That it was therefore necessary to instruct counsel on the whole case and furnish them with the same briefs, and that therefore, the fees which were allowed as proper on the original hearing were not excessive on the appeal.

Mr.

(*a*) *This was an error as appears from the dates.*

Mr. *Lloyd* and Mr. *Martindale*, *contrà*. The appeal in this case was not from the whole decree, and the Defendants, except the Appellant, could only be heard in support of the decree. The Taxing Master was necessarily bound to dissect the briefs, and determine what part of the proceedings ought properly to have been supplied to counsel, and he has correctly determined that it was unnecessary to furnish counsel with the answers of the Defendants who did not appeal, for they could not be used. The Master has dealt with great liberality, and, under the circumstances, the fees given on the appeal were excessive, and the excess ought to be borne by the Plaintiff. Again, this is, strictly, a question of *quantum* and not of principle, and it is the settled law, that this Court will not review the decision of a Taxing Master on a mere question of the *quantum*, involving no general principle.

The MASTER *of the* ROLLS.

I think the Master has, through misapprehension, come to a wrong conclusion. The Master seems to have thought that the fees paid to the Plaintiffs' counsel on the original hearing were proper and has allowed them. The principal Defendant appealed from the whole decree, I call it the whole decree, because, except a small portion, it was so, and the whole matter was really before the Court of Appeal. The Master has disallowed a portion of the fees paid with the briefs on the appeal, on the ground that it was "the appeal of one Defendant only, whose interest was separate snd distinct from all the rest, and that the answers of the other Defendants were not necessary for the Plaintiffs' counsel on the appeal." But I apprehend that evidence given for any Defendant is evidence for the whole cause, and that the Plaintiff may make use of it both in argument or comment.

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comment. I have known it done repeatedly, and I think that any evidence in the cause may be made use of by the Plaintiffs against the Defendants, and by the Defendants against the Plaintiffs. That being so, I do not see how the Master could come to a right conclusion in determining that any part of the evidence was unnecessary without hearing the cause itself.

Where there is an appeal from a small portion of a decree, as in respect of parties or as to a trifling matter, I can understand that the fees to counsel may be much less than on the original hearing, and I have no doubt that this would be a matter of *quantum* quite in the discretion of the Taxing Master. But as he states the rule to be this, viz., to allow the same fee on an appeal from whole decree as on the original hearing, I do not see how he could decide that a portion of the brief which was necessary on the first hearing was unnecessary on the appeal, without hearing the cause; nor do I see how the solicitor could take upon himself to decide that any part of the original brief might prudently be omitted from the brief on the appeal.

The Master, as a second reason, attributes something to the rapidity with which the appeal was brought to a hearing, and thinks that therefore there would be less labour to counsel to master the case. I dissent from that view of the case also, and as I disagree with the Master, I must either allow the fee to counsel, or direct a review of the taxation.

1858.

Re THE STAFFORD CHARITIES.

Nov. 13.

One reference having been made to settle a scheme as to twenty charities, the costs were paid out of an existing available fund belonging to three of them; but it was ordered that they should be ultimately borne, rateably, by the twenty charities.

THERE were twenty charities in *Stafford*, which were the subject of this proceeding under Sir *Samuel Romilly's* Act (*a*), to settle a scheme.

The question was how the costs were to be provided for, and there being an existing available fund of 450*l.* arising from capital and income of three of the charities,

The MASTER *of the* ROLLS ordered the costs to be paid out of the 450*l.*; but he directed them to be ultimately borne by the twenty charities rateably.

Mr. *Kenyon* for the trustees of the charities.

Mr. *Wickens* for the Attorney-General.

(*a*) 52 *Geo.* 3, *c.* 101.

1859.

DAKING *v.* WHIMPER.

April 29.

When a voluntary settlement of lands is avoided by a subsequent sale for valuable consideration, the volunteers have no equity against the purchase-money payable to the settlor.

Bill by purchaser against the vendor, who had previously executed a voluntary settlement of the property, and against the trustees and *cestui que trusts* under the settlement, to have the settlement declared void and delivered up, and for a specific performance, sustained, the only objection to the title being the voluntary settlement.

THE parents of the Defendant *Whimper* had estates for life in some freehold, copyhold and leaseholds called the "*Bentley Lodge Estate*" with power to appoint it to any of their children. In 1813, they appointed this estate to their son, the Defendant *Whimper*, retaining, however, a power of revocation. On the 20th of *September*, 1836, they revoked the deed of 1813, and appointed the estate to the Defendant in fee, subject to a rent-charge of 100*l.* a year, payable to their daughter *Jane Susan*, with a similar power of revocation.

By a voluntary deed, dated the 19th of *November*, 1836, made between the Defendant *Whimper* of the one part, and two trustees (*Steward* and *May*) of the other part, *Whimper* conveyed the freeholds and leaseholds to the trustees, to the use of himself for life, with remainder to his children, with remainder to his sister *Jane Susan* for life, with remainder to her children, and the deed contained a covenant to surrender the copyhold part of the property.

Jane Susan married Mr. *Lemon*, and in *July*, 1838, her parents revoked the rent-charge provided for her by the deed of *September*, 1836, by appointing the estate to the Defendant in fee discharged of it.

In *June*, 1858, the Plaintiff contracted to purchase the property for 11,000*l.*, and notice having been given to him of the settlement of *November*, 1836, and this apparently being the only objection to the title, the Plaintiff

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DAKING v. WHIMPER.

Plaintiff filed this bill against *Whimper*, (who had no child,) *Steward* and *May*, the trustees of the settlement, and *Lemon*, and *Susan Jane* his wife, and their children, praying that the settlement might be declared null and void against the Plaintiff, and that it might be delivered up accordingly, and that *Whimper* might be decreed specifically to perform the contract, or, in the alternative, for the repayment of the deposit, and that it might be raised out of *Whimper's* interest in the estate.

Mr. and Mrs. *Lemon* resisted this relief on the following grounds:—First, that the deed was not voluntary, the annuity of 100*l.* to Mrs. *Lemon* having, as they alleged, been revoked in consideration of the settlement. Secondly, that the sale to the Plaintiff was colorable and not *bonâ fide*, and a mere device and contrivance on the part of *Whimper* to defeat the settlement. Thirdly, they submitted "that at all events, if the Plaintiff was entitled to have the alleged sale carried into effect and specifically performed as against them, then that the purchase-money should be substituted for the property, and treated and considered as subject to trusts similar or analogous to the limitations of the property contained in the settlement; that, if necessary, *Whimper* should be declared trustee thereof accordingly, and that the purchase-money should be properly secured and made productive, under the direction of this Court, to be enjoyed in accordance with the limitations contained in the settlement of and concerning the property thereby settled."

Mr. *R. Palmer* and Mr. *E. Rodwell* argued that the settlement was voluntary, and void as against the purchaser for valuable consideration. That such a title would be forced on a purchaser, and that the frame of the bill was consistent with the authorities; *Willats* v. *Busby*

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Busby (*a*); *Nelthorpe* v. *Holgate* (*b*); *Collett* v. *Hover* (*c*); notwithstanding *Tasker* v. *Small* (*d*).

Mr. *Southgate* for the vendor *Whimper*. A title depending on the invalidity of a voluntary conveyance against a subsequent purchaser for valuable consideration even with notice will be forced on a purchaser; *Butterfield* v. *Heath* (*e*). The volunteers have no equity as against the purchase-money; that seems to have been the opinion of Lord *Thurlow*, as is stated by Lord *Eldon* (*f*) in *Pulvertoft* v. *Pulvertoft* (*g*). The purchase-money is therefore payable to the vendor *Whimper*.

Mr. *Fooks* for Mr. and Mrs. *Lemon*. The settlement was not voluntary, for the appointment and settlement were part of the same transaction. The Plaintiff is not in a position to maintain such a suit as this, for the parties to a contract should alone be parties to a suit for its performance; *Tasker* v. *Small* (*h*); and on this record, the Plaintiff is not entitled to litigate the questions now raised. The settlor cannot insist on the invalidity of his own deed, and as against him, therefore, the purchase-money is affected with the trusts of the settlement.

The MASTER *of the* ROLLS.

I am of opinion that the settlement is of no effect, and that it is entirely defeated by the sale for valuable consideration, even though the purchaser had notice of the settlement. As to the copyholds, they rest on a covenant

(*a*) 5 *Beav.* 193.
(*b*) 1 *Collyer*, 203.
(*c*) *Ibid.* 227.
(*d*) 3 *Myl. & Craig*, 63.
(*e*) 15 *Beav.* 408.
(*f*) *Referring to Evelyn* v. *Templar*, 2 *Bro. C. C.* 147.
(*g*) 18 *Ves.* 91, *reported as Metcalfe* v. *Pulvertoft*, 1 *Ves. & Beav.* 180, *and* 2 *Ves. & Bea.* 200.
(*h*) 3 *Myl. & Cr.* 63.

covenant to surrender, and undoubtedly this Court would not enforce it. The whole thing is destroyed as soon as the property is sold; and I am prepared to make a decree for specific performance, and for a conveyance of the property to the purchaser.

As to the costs of suit, I cannot make the *cestuis que trust* of the deed of 1836 pay any costs. They are standing on their rights which the vendor *Whimper* gave them, and they are brought here to get rid of the consequences of his own act, but I do not think I can give them costs.

With respect to the trustees, they are on a different footing; they are parties to the deed, and I do not think that they could safely have done anything more than they did. I think *Whimper* must pay the costs of the trustees, which have been occasioned by his own voluntary act.

I must make a decree for specific performance; the Plaintiff must pay the costs of the two trustees, and have them over as against the vendor, and the vendor must pay the Plaintiff's costs of suit. There must be a conveyance by the trustees, and their costs must be taxed as between party and party.

GREENWOOD *v.* PERCY.

March 10, 22.

A testator devised freeholds to two and their heirs as tenants in common, and in case either should die without leaving lawful issue surviving her, then he devised her part "unto the survivor." *Held*, that "survivor" was to be read in its ordinary sense, and not in the sense of "other."

A partition decreed without a commission, in a case in which infants were interested, upon satisfactory evidence of the value.

WILLIAM Vickery, by his will, dated the 30th of *January*, 1852, devised in the words following:—"I devise all my freehold messuages, lands, hereditaments and real estate, whatsoever and wheresoever, unto my two daughters *Mary*, the wife of *Percival Percy*, and *Elizabeth Vickery*, to hold to them my said daughters, their respective heirs and assigns, as tenants in common and not as joint tenants; and in case either of my said daughters shall die without leaving lawful issue surviving her, then I devise the part or share of her so dying of and in the said messuages, lands, hereditaments and real estate unto the survivor of them, her heirs and assigns for ever."

The testator died in 1852, leaving his two daughters surviving him. After his death his daughter *Elizabeth* married the Plaintiff Mr. *Greenwood*. *Mary Percy* died in 1855, leaving her husband and three infant daughters (who were her co-heirs) her surviving.

The suit was instituted by Mr. and Mrs. *Greenwood* against Mr. *Percy* and his three infant daughters, praying a partition of the devised estate in two equal parts.

Mr. *Jessel*, for the Plaintiff, argued, that under the will, the Plaintiff, Mrs. *Greenwood*, had become absolutely entitled to a moiety of the estate; that the clause of survivorship had determined, for the word "survivor" must be read in its ordinary sense, and not as importing "other."

"other." He pointed out the inconsistency which would follow by holding the contrary, for if one daughter died without issue, and her share went over to the other, then, on the subsequent death of the second without issue, the whole estate must, according to the contention, go over to the heir of the "other" who had predeceased her.

Mr. *Bagshawe, jun.*, for the Defendants, argued that the word "survivor" ought to be read "other," and that if Mrs. *Greenwood* died without issue her share would go over to the Defendants, and that in such case a partition could not at present be effected.

The case of *Smith* v. *Osborne* (*a*) was cited, and see *Jarman on Wills* (*b*).

The MASTER *of the* ROLLS.

I have no doubt that the word *survivor* ought to be read according to its strict interpretation, and in the ordinary meaning of that word.

Apart from the decisions, the observation of Mr. *Jessel* is unanswerable. Suppose they both die without issue, when one dies her share goes to the other, and when the other dies without issue her share goes over to the former, who was dead at the time.

I have always considered the case of *Aiton* v. *Brooks* (*c*), and it has always been treated, as not quite consistent with the previous authorities; and there were peculiar circumstances in it which prevent its governing an ordinary case.

The tendency of modern decisions is to construe words

(*a*) 6 *H. L. Cas.* 392. (*b*) *Chap. xlvii.* (*c*) 7 *Simons*, 204.

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words according to their natural signification, and not to turn them to something else, on the ground that it must have been intended and that it is more beneficial to the legatees. The cases of *Crowder* v. *Stone* (*a*) and *Leeming* v. *Sherratt* (*b*) decide this case. The word "survivor" must be treated in its ordinary sense, and the Plaintiffs are therefore entitled to a partition.

It was next asked that the Court would make a partition without a commission, upon evidence and a valuation of the property, which shewed the property could be conveniently divided into two moieties. The value of a house and four cottages proposed to be taken by the Plaintiffs was valued at 604*l.*, another house and six cottages proposed to be allotted to the Defendant being valued at 695*l.* The only difficulty suggested was the infancy of the co-heirs.

The MASTER *of the* ROLLS thought he could direct a partition without a commission, though the Defendants were infants, for he considered that he could bind their interests in the same way as in other cases. He said he would look into the evidence.

The MASTER *of the* ROLLS.

March 22. I have looked into the evidence and the valuation, and am satisfied. I will therefore make an immediate decree for partition.

(*a*) 3 *Russ.* 217. (*b*) 2 *Hare*, 14.

NOTE.—*See Bowra* v. *Wright*, 4 *De Gex & Sm.* 265; *Stanley* v. *Wrigley*, 3 *Smale & G.* 18.

1859.

ALLOWAY *v.* BRAINE.

March 8, 9, 10, 19.

THIS bill was filed, in *June*, 1857, by four gentlemen of the name of *Alloway*, against *Cornelius Braine* and *Thomas Braine* alone, praying—

1. A declaration, that the Defendants took one-fourth of a mine under a conveyance of the 24th of *November*, 1846, as trustees for four persons, through whom the Plaintiffs claimed it, and that they were trustees for the Plaintiffs, or, at all events, that they held it, subject to the performance of an agreement of the 8th of *June*, 1846, and that the same ought to be specifically performed.

2. That the Defendants might convey it to the Plaintiffs.

3. But if the Court should be of opinion that the Defendants had any beneficial interest in the mine, the rights of all parties might be declared.

The facts were very complicated, but, for the purposes of the decision, they are sufficiently stated in the judgment of the Court.

Mr. *R. Palmer*, Mr. *De Gex* and Mr. *Eddis* for the Plaintiffs.

Mr.

In *June*, 1846, *A.* agreed to sell his share in a mine to *B.*, and four months afterwards he agreed to sell it to *C.*, who paid part of the purchase-money. In the month following, *A.*, having given notice to *B.* that he repudiated the first contract, conveyed to *C.* No steps were taken by *B.* for ten and a-half years, when a suit was instituted against *C.* alone, to have a declaration that *C.* was a trustee, and for a conveyance.

Held, that the right was barred by lapse of time and laches.

Held also, that the result would have been the same if the subject had been ordinary instead of mining property.

A specific performance will not be decreed after a delay of ten years, when nothing has been done in the meantime.

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ALLOWAY v. BRAINE.

Mr. *Selwyn* and Mr. *Jolliffe* for the Defendants.

The following authorities were cited:—*Norway* v. *Rowe* (*a*); *Sharp* v. *Milligan* (*b*); *Southcomb* v. *The Bishop of Exeter* (*c*); *Heaphy* v. *Hill* (*d*); *Macbryde* v. *Weeks* (*e*); *Walker* v. *Jeffreys* (*f*); *Chesterman* v. *Mann* (*g*); *Prendergast* v. *Turton* (*h*).

The MASTER *of the* ROLLS.

In order to explain the view I take of this case, it is necessary that I should shortly state the dates and the principal facts which have occurred in this matter.

The question arises as to a gale in the *Wigpool* mine, in the *Forest of Dean*, which was granted by the deputy gavellers to *Elisha Mattheus*, one of the free miners, who alone are the persons entitled to apply for gales under the Acts of Parliament (*i*) regulating the customs of the *Forest of Dean*. He applied for a gale (numbered 124) on the 9th of *November*, 1838, and on the following day, three free miners, named *Roberts*, *Dubberly* and *James Matthews*, also severally applied for gales for themselves.

At that time, Mr. *Bennett*, whose name is much mixed up with the proceedings and the evidence in this case, but who is not a party to it, was in partnership with the Defendants (*Cornelius Braine* and *Thomas Braine*), who, on the 26th of *January*, 1839, entered into an agreement with various free miners, and among others,

(*a*) 19 *Ves.* 144.
(*b*) 22 *Beav.* 606, 612.
(*c*) 6 *Hare*, 213.
(*d*) 2 *Sim. & St.* 29.
(*e*) 22 *Beav.* 533.
(*f*) 1 *Hare*, 341.
(*g*) 9 *Hare*, 206.
(*h*) 1 *Younge & C.* (*C. C.*) 98; *and see Dart.* 580 (2*nd ed.*)
(*i*) 1 & 2 *Vict. c.* 42.

others with *Elisha Matthews*, for the purchase of gales.

Nothing appears to have been done in this matter for several years, and in *April*, 1845, *Bennett* and the *Braines* dissolved partnership, and at the same time compromised certain matters in difference between them; and they agreed that "all gales and applications for gales, &c., should belong to the two *Braines*." I do not think much turns upon that agreement.

In the following year, on the 8th of *May*, 1846, *Roberts* and *Dubberly* (two of the free miners) entered into a sort of partnership with *Hawkins* and *Trotter*; and on the 8th of *June*, 1846, *Elisha Matthews* entered into an express agreement with *Hawkins*, *Trotter*, *Roberts* and *Dubberley* to sell his gale to them for 10*l.*, of which 7*l.* 10*s.* was then paid.

On the following day, the same four persons also entered into an agreement with *James Matthews* for the purchase of his gale; and on the 17th of *June*, notice was given to the deputy gavellers of these two agreements.

On the 15th of *June*, 1846, a memorial was presented to the Woods and Forests by Messrs. *Braine* against granting the gales to *Roberts* and *Dubberley*, and on the 19th of *June*, a counter memorial was presented by other persons under whom the Plaintiffs now claim. Nothing turns upon that further than this:—That it appeared by those memorials that there were considerable matters of contest between these parties. The Woods and Forests referred the whole matter to the deputy gavellers, for them to settle the dispute as they thought fit.

On

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On these memorials, several meetings took place before the deputy gavellers. The first was on the 6th of *July*, 1846, which was attended by many persons, and the matters in contest were entered into and discussed and explained, and ultimately arrangements were made as to the mode of dividing the mine. *Roberts*, *Dubberley*, *James Matthews*, and *Elisha Matthews*, were to have the part called the *Wigpool* iron mine between them.

Afterwards, on the 30th of *October*, the *Braines* agreed to purchase from *Elisha Matthews* the gale which was to be granted to him, but which he had previously, on the 8th of *June*, 1846, agreed to sell to the four other persons. The purchase-money was 150*l.*, of which 50*l.* was paid to him at that time, and a a bill for 100*l.* was to be given for the remainder, in case he should obtain the gale.

On looking through the evidence, I cannot find that the *Braines*, at the time they entered into that agreement, knew of the agreement which had been entered into by *Elisha Matthews* with *Hawkins*, *Trotter*, *Roberts* and *Dubberley*. They deny that they had notice, and express notice is certainly not proved. It was argued that notice having been given to the deputy gavellers, and the whole matter having been discussed at great length at the meeting, it is scarcely possible to conceive that they did not know of the transaction; however, the evidence altogether fails in proving any notice, and they expressly deny it.

On the 3rd of *November*, there was another meeting of the deputy gavellers, at which nothing conclusive was done; and on the 18th of *November*, express notice was given to the *Braines* by *Trotter*, *Hawkins*,

kins, Roberts and *Dubberley*, of the agreement of the 8th of *June*, 1846, under which the Plaintiffs now claim.

Then came the important meeting of the 24th of *November*, at which the deputy gavellers granted the *Wigpool* mine to these four persons, *Roberts, Dubberley, James Matthews* and *Elisha Matthews*. Their applications were all united together, and the deputy gavellers treated them so. Whether they considered them as associated or united together, except under the assumption of the validity of the agreement of the 8th of *June*, 1846, it may be difficult to say.

On the same day (24th of *November*) *Elisha Matthews*, by his solicitor, gave notice in writing to *Hawkins, Trotter, Roberts* and *Dubberley*, that he should treat the agreement of the 8th of *June*, 1846, as void. He offered to return them the 7*l.* 10*s.*; he denied that they had any interest whatever under that agreement, or that there was any validity in it, and he refused to execute a conveyance of his fourth share of the gale. On the same day (24th of *November*) *Elisha Matthews* executed a conveyance of his one-fourth of the mine to the *Braines*, and, at the same time, he received the bill for 100*l.*, which was paid at maturity, six months afterwards.

There were many other transactions, which it is unnecessary to detail, under which three-fourths of the mine ultimately became transferred to the Plaintiffs, together with the right, under the agreement of the 8th of *June*, 1846, to *Elisha Matthew's* one-fourth.

It

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It is remarkable, that these persons, who, from the 24th of *November*, 1846, had full notice that *Elisha Matthews* had conveyed the legal estate in one-fourth of the mine, should never have taken any step whatever to contest its validity down to the month of *June*, 1857. No rent had been paid,—no works had been commenced,—no possession, in the proper sense, had been taken; in fact, nothing had been done but a conveyance from the three miners to the Plaintiffs.

The matter so remained until the 21st of *June*, 1857, when a conveyance was made, by which it was endeavoured to cure the defect of *Elisha Matthews* not having been made a party; by this deed *Hawkins*, *Trotter*, *Roberts* and *Dubberley* conveyed all the interest they had in the mine to the Plaintiffs, who on the 15th of *June*, 1857, filed this bill.

As soon as it was necessary for the purposes of this suit, possession was taken by the Plaintiffs,—they paid the rent as soon as it became due,—and though they have not sunk a pit on the ground, they have sunk one on the adjacent land and attempted to work into it under ground: all the possession that has been taken by any one was taken by them. But this is not enough: the persons under whom the Plaintiffs claim, having had distinct notice of the conveyance of this property on the 24th of *November*, 1846, take no steps on the subject for ten years and a half, that is not until the 15th of *June*, 1857, and that lapse of time I think is fatal to the case of the Plaintiffs.

The only argument by which this objection was attempted to be met was, that time would be material if there

there had been any change and the parties could not be restored to the same situation, but that where there has been no change, time is not at all material; but can this possibly be held to be so in this case? which, stripped of all unimportant circumstances, is simply this: on the 8th of *June*, 1846, the owner of an estate or of a gale, (it does not matter which,) agrees to sell it to the Plaintiffs, and on the 30th of *October*, 1846, he agrees to sell it to the Defendants. I am indifferent whether any notice was given of it or not, there certainly is nothing like fraud imputed. On the 24th of *November*, 1846, the vendor says to the Plaintiffs "I repudiate your agreement altogether, and I insist that you have no right or interest under it, you have nothing to do with my gale, and I shall convey it to the Defendants;" and he accordingly conveys the estate to the Defendants. No possession is taken under the agreement for several years, when it is taken by persons who had entered under the first agreement. But can it be said that these persons can be replaced in the same situation? There is first a conveyance of the legal estate valid upon the face of it, and in order to succeed, the Plaintiffs must first make out their right to have that conveyance delivered up to be cancelled. They must, in the second place, obtain a decree for specific performance against *Elisha Matthews*; but he is not a party to the suit, and if he were, he might say, "the first agreement is utterly void, and if you had insisted on it at the time I gave you notice that I should treat it as void, I could have proved it to be so, and that you could claim no benefit whatever under it." Besides this, he might say, "I have treated it as a void agreement by entering into another agreement with the Defendants and by conveying the gale to them."

Ten years after the repudiation of the contract by *Elisha*

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Elisha Matthews the Plaintiffs claim to be entitled to have his conveyance treated as nothing, without asking that it may be delivered up to be cancelled, or praying, as against *Elisha Matthews*, the specific performance of the agreement, or even making him a party to the suit. The Defendants, parties to the second agreement, may have done all sorts of acts and entered into all sorts of arrangements with respect to this matter on the faith of that deed, which they were perfectly well aware that the Plaintiffs had taken no steps whatever to set aside. It was the duty of the Plaintiffs, as soon as they knew of the second contract, at once to have filed a bill to set it aside, and to have the first agreement specifically performed. I think it is unnecessary to go into any of the other circumstances beyond this, for if the matter had rested only in contract with the Plaintiffs, and there had been no dealings between *Elisha Matthews* and the Defendants, if this suit had been solely against *Elisha Matthews* himself, who had ten years' previously given the Plaintiffs notice that he repudiated the contract, and had insisted that there was no contract binding upon him, I should not, at that distance of time, have specifically enforced it.

The result is, that the Plaintiffs' right, if any, is confined to the recovery of the 7*l.* 10*s.* but that is also barred by time, if not, they may bring their action for it. I am of opinion therefore, that the principal part of this bill entirely fails, and that the only relief the Plaintiffs are entitled to is under the third paragraph of the prayer, which prays a declaration of the rights, and I am prepared, if the Plaintiffs wish it, to declare that the Defendants are entitled to one undivided fourth part in the *Wigpool* mine, and with that exception, the whole of the Plaintiffs' bill must be dismissed with costs.

NOTE.—*An Appeal to the House of Lords is pending.*

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AMES *v.* MANNERING.

March 22.

On the death of a mortgagor in 1833, his widow (who was entitled to dower) took possession of the mortgaged estate, with the consent of the co-heirs and she paid interest on the mortgage. In 1858, the mortgagee instituted a suit to realize his mortgage, in which it did not appear that any interest had been paid by one of the co-heirs during the interval. *Held*, that the payment of the interest by the widow prevented the statute running, for either such co-heir was himself barred, or the payment of interest had been made on his behalf.

ON the 15th of *April*, 1829, *James Mannering* created an equitable mortgage of some gavelkind property. He died in *April*, 1833, leaving *Elizabeth Mannering*, his widow, and three sons, *James*, *George* and *Charles*, his gavelkind heirs. *Charles* died about seventeen years ago, leaving two daughters, *Eliza* and *Julia*.

This was a suit by the mortgagee against the widow and the two surviving sons, and the daughters of *Charles*, to realize the mortgage security.

By the decree made in *June*, 1858, the following enquiries were directed:—

An enquiry *who had been in the receipt* of the rents and profits of the property *since the date* of the mortgage, namely, the 15th *April*, 1829, or in possession of the premises, and under what circumstances.

An enquiry *what payments* had been made in respect of interest on the equitable mortgage, and by whom, and by whose order or authority, and at what times and under what circumstances.

The Chief Clerk found that the intestate was in possession until his death, in *April*, 1833, since which time *Elizabeth Mannering* had been in possession thereof, under the following circumstances:—

Elizabeth Mannering took possession of the premises by

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by the consent and with the approbation of her sons, *James*, *George* and *Charles* (deceased); for it appeared that *George* and *James* had, for several years, lived with their mother on the premises.

He also found, that interest on the equitable mortgage had been paid to the Plaintiff by *Elizabeth Mannering*, from the death of the intestate, *James Mannering*, in *April*, 1833, to the month of *September*, 1844, but by whose order or authority, and at what times, or under what circumstances in particular, there was no evidence to shew, further than that *Elizabeth Mannering*, being the widow of the intestate, and entitled to dower, entered into possession of the mortgaged premises, and kept down the interest on the mortgage.

He also found that *George* had paid interest, the last payment being in 1850, and that *James* had paid 1*l.* for interest in 1846.

The case came on for further consideration, when

Mr. *Biron*, for the two daughters of *Charles*, argued, that, as against them, the claims of the mortgagee were barred by the Statute of Limitations (*a*), no part of the principal or interest having been paid by *Charles* or his daughters, and no acknowledgment having been given since the intestate's death, in 1833.

That the widow's claim was paramount to the mortgage, and that she was not liable to pay any part of the interest, and that, therefore, such payment by her was to be treated as the voluntary payment of a stranger.

The

(*a*) 3 & 4 *Will.* 4, *c.* 27, *s.* 40.

The MASTER *of the* ROLLS.

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I am of opinion that the daughters of *Charles* are bound by these payments. The widow must be regarded as being in the position of a stranger, or the agent of the infants or the tenant of the mortgagee. The daughters are, therefore, either barred themselves or, as against them, interest has been paid on the mortgage.

STRINGER *v.* HARPER. (No. 2.)

March 22, 23, 24.

Costs of a suit to administer both real and personal estate, and to ascertain the rights to both, were *held* payable, primarily, out of the personal estate, notwithstanding the personal estate was, by the will, exonerated from payment of the debts, and the costs and charges of proving the will.

THE testator had three small freehold properties: 1st, the *Bobbington* Estate which was mortgaged; 2nd, the *Miners' Arms* Estate which was also mortgaged; and 3rd, the *Stone Street* Estate which was charged in aid of the mortgage on the *Miners' Arms* (*a*).

By his will, dated in 1855, the testator said, "I exempt my personal estate from payment of my just debts." He devised the *Bobbington* Estate to the Plaintiff, in trust for sale, and to pay "all the debts justly due and owing from him at the time of his decease, and the costs and charges of proving his will," and to invest the residue for his widow and children. He bequeathed both his personal estate and the produce also of the *Stone Street* Estate (which he devised to the Plaintiff for sale), on trusts for his wife and children.

The testator died in 1856, but, in his lifetime, the mortgagee sold and conveyed the *Bobbington* Estate. The surplus produce amounted to 80*l.*, which was paid to

(*a*) *See ante*, p. 33.

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to the executors. The personal estate amounted to above 170*l.*, and the *Stone Street* Estate had also been sold by the Plaintiff for 880*l.* The *Miners' Arms* Estate descended on the heir, subject to the mortgage.

The bill prayed for the administration of the real and personal estate, and that the rights of the parties in the real and personal estate might be ascertained.

By the decree, it was declared that the debts and funeral and testamentary expenses were payable out of the *Miners' Arms* Estate, and that the personal estate was exonerated therefrom. The cause came on for further consideration, when the question was, whether the costs of suit ought to be borne by the *Miners' Arms* Estate or by the real and personal estate rateably, or by the personal estate exclusively.

Mr. *Marten*, for the Plaintiff and some of the Defendants, argued that the suit had been occasioned by questions arising on the real estate, and that the *Miners' Arms* ought to bear the costs of suit, or at all events, that they should be apportioned; *Morrell* v. *Fisher* (*a*); *Alsop* v. *Bell* (*b*); *Sanders* v. *Miller* (*c*).

Mr. *C. T. Simpson*, for the heir at law, argued that the personal estate was not exonerated from the payment of the costs of suit, and that it was the first fund to be applied to that purpose; *Browne* v. *Groombridge* (*d*); *Ripley* v. *Moysey* (*e*); *Pickford* v. *Brown* (*f*).

Mr. *Bovill* for a mortgagee.

Mr. *Marten* in reply.

The

(*a*) 4 *De G. & S.* 422.
(*b*) 24 *Beav.* 451.
(*c*) 25 *Beav.* 154.
(*d*) 4 *Madd.* 495.
(*e*) 1 *Keen*, 578.
(*f*) 2 *Kay & J.* 426.

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I have no doubt that testamentary expenses do not include costs of suit; the only question is, whether the costs ought to be apportioned. There are four sorts of property: first, the surplus of the sale of the *Bobbington* Estate; secondly, the *Miners' Arms* Estate, as to which the will is silent, and which therefore passed to the heir at law; thirdly, the surplus of the *Stone Street* Estate; and fourthly, the general personal estate.

In *Ripley* v. *Moysey* (*a*), it was held, that the personal estate was the first fund for payment of all the costs and charges occasioned by the will, and the costs of ascertaining the devisee of the real estate, and of the Attorney-General, who was made a party in respect of a charge on the real estate. I will consider the point.

The MASTER *of the* ROLLS.

March 24.

I have looked at the cases, and on consideration of all the matters, I think that the costs of administration, generally, must be borne by the general personal estate.

(*a*) 1 *Keen*, 578.

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Re MEDEWE'S TRUST.

Feb. 28.
March 1.

A security given by a customer to his bankers for the balance "which shall or may be found due on the balance of" the account: *Held*, to cover the existing balance only, and not to be a continuing security for the floating balance.

The rule in *Clayton's Case* (1 *Mer.* 572), as to appropriation of payments, has ever since been acted on.

MR. *Medewe* kept the following three accounts with his bankers, Messrs. *Alexander*:—

1st. His private account.

2ndly. His partnership account in the name of himself and Mr. *Brook*.

3rdly. His executorship account in the name of himself and Mrs. *Lucock*.

In *January*, 1857, these three accounts were considerably overdrawn, and the bankers required some security.

Accordingly, on the 12th of *January*, 1857, Mr. *Medewe* gave the bankers his deed poll, which, after reciting the three accounts, and that "there is a considerable balance due" to Messrs. *Alexander* "on the said several accounts," and that Messrs. *Alexander* "having required security for the balance due on the said several banking accounts," *Medewe* had agreed to charge his estate after described (subject to the incumbrances) "with the payment of the balance of all the said several accounts, limited to the aggregate sum of 3,000*l.* as hereinafter contained: and whereas *Medewe* and *Brooke* have also agreed to execute a joint and several bond for further securing the balance of their banking account, and *Ann Lucock* hath also agreed to deposit with *Alexander* the title deeds relating to certain hereditaments at *Grundisburg* belonging to her, and with *Medewe* to execute a joint and several bond for further securing the balance of their said executorship

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ship account:" *Medewe* then charged his estate called *Witnesham* Hall with the payment to *Alexander* "*of the three several sums of money which shall or may be found due on the balance of the said several accounts* for principal, interest, commission and other usual and lawful bankers' charges, not exceeding in the whole the aggregate sum of 3,000*l.* sterling, subject to the existing mortgages (stating them). It then proceeded thus:—And *Medewe* hereby covenants with *Alexander* that he will, within three months after demand, pay unto *Alexander* "such several sums as may be due on the said several banking accounts as aforesaid, not exceeding in the whole the aggregate sum of 3,000*l.*"

On the same 12th of *January*, 1857, Mrs. *Lucock* and *Medewe* executed a joint bond to Messrs. *Alexander* for 600*l.*, reciting the executorship account, and that "there is a balance of 300*l.* or thereabouts now due" from them to Messrs. *Alexander*, who having required security, Mrs. *Lucock* had agreed to deposit certain title deeds. The bond was to be void, if the obligors paid Messrs. *Alexander* "all such sum or sums of money as now are *or which shall from time to time be or become due* and owing on the said banking account," not exceeding 300*l.* And it was declared, that the deeds were deposited for better securing the balance of the said banking account.

The three accounts were balanced on the 12th of *January*, 1857, when it appeared that 2,021*l.* was due to the bankers on the first account, 652*l.* on the second, and 300*l.* on the third, making, with the fractions, 2,974*l.*

The three accounts were afterwards continued, and sums were paid in and drawn out. In *December*, 1857, Messrs. *Alexander* obtained a judgment against *Me-*

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deme for [illegible] in an action on the covenant contained in the deed-poll.

In *July*, [illegible], the mortgagees sold the *Witnesham* estate under a power of sale, and there remained, after paying off the mortgages, a balance of 2,499*l*. Messrs. *Alexander* claimed, under the deed-poll, to have this amount applied in payment of the balance due to them on the three accounts, which in *November*, 1858, was [illegible]. *Medewe* had, on the 19th of *November*, [illegible], conveyed his property to trustees for his creditors, who resisted this claim, and the fund was, in consequence, paid into Court.

Messrs. *Alexander* now presented a petition, praying payment to them of the fund in Court in discharge of their claims.

Mr. *R. Palmer* and Mr. *Prendergast*, for the Petitioners, argued that the security was for the floating balance which might, from time to time, become due to the bankers from their customers; *Pease* v. *Hirst* (*a*), *Woolley* v. *Jennings* (*b*).

That the covenant to pay, "within three months after demand, such several sums as may be due" on the banking accounts, clearly pointed to a future debt, and that the circumstance, of interest not being reserved from the date of the deed, shewed that it was to commence at a future period and on a future debt; a circumstance which had been much relied on in *Walker* v. *Hardman* (*c*).

Mr. *Lloyd* and Mr. *Lewin*, *contrà*, argued, first, that the

(*a*) 10 *Barn. & C.* 122.
(*b*) 5 *Barn. & C.* 165.
(*c*) 4 *Clark & Fin.* 258.

the liability under the covenant had wholly merged in the judgment; secondly, that upon the terms of the deed poll, the security was only for the actual balance at the time. They referred to 1 & 2 *Vict.* c. 110, s. 32, 2 & 3 *Vict.* c. 82.

Mr. *Eddis* for the mortgagees.

Mr. *R. Palmer* in reply.

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I cannot hold that these words include future balances. The deed-poll, after reciting "that there is a considerable balance due" on the three accounts, and an agreement to secure "the balance," goes on to charge the estate with "the three several sums of money which shall or may be found due on the balance of the said several accounts." In the words "shall or may" there is an element of uncertainty; the bankers and their customers had not agreed upon what the balance was, though it did not exceed 3,000*l.*, and it seems to have been arranged that the amount should be settled thereafter and that the balance should be secured. If that were so, I do not know what words could more aptly describe the intention than to say, "I give a security to the extent of 3,000*l.* for whatever balance may be found due from me." I think it impossible to insert in the deed the words "such balance which shall from time to time become due;" I must first decide that these words are to be implied, before I can come to that conclusion. As to the covenant, if it included future balances, it would not determine the question, because the covenant might go beyond the charge, and the principle of controlling expressions inconsistent with the general intention would apply to the operative part

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of the covenant. Certainly the covenant to pay "within three months after demand" "such several sums as may be due on the said several banking accounts" would seem to apply to such sum as was due at the time of demand; but the words are "on the said several banking accounts as aforesaid," referring back to these three accounts previously specified; and I am disposed to think, that the covenant does not carry it any further. The difficulty probably has arisen from the bankers not being aware of the rule of *Clayton's case* in *Devaynes* v. *Noble* (*a*), which has always been acted on since, that payments not specifically appropriated are to be attributed to the payment of the earliest of several debts.

On the whole, I can come to no other conclusion than that the deed does not secure the balance which from time to time may accrue due.

I am of opinion, that there was not only the element of uncertainty, which is usually considered to attach to long accounts between parties, but that uncertainty which usually exists between a banker and his customer, though the banking book is constantly passing between them. The customer may contest the fact that he gave a cheque to a certain amount, or he may assert that money has been paid in on his account which does not appear in his pass book, and, therefore, there is always this element of uncertainty unless the account has been settled and agreed on between them.

There is a recital that *Medewe* and Mrs. *Brooke* had agreed to execute a joint bond, and it is certainly in favor of the Petitioners, that you find, when you turn to the only bond which was given, that it secures future balances

(*a*) 1 *Mer.* 572.

balances which shall from time to time be or become due.

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To this is added the argument that the covenant does not secure the interest, and that the deed not carrying interest from the date is a strong indication of the intention to secure the future balances. To support which I was referred to a case in the House of Lords, where the principal was payable on demand, with interest from the date of the bond; but this deed does not do this, for this reason, that if the account were carried on it would have carried interest, because that was the custom of dealing between the parties. These matters, however, cannot alter the case. The parties dealing probably did not know the law, and I think it likely that they believed that the deed-poll would secure the future balance whatever it might be.

The cases cited do not affect the present case, which, I am of opinion, depends on the words of the deed, and I think that its true construction is, that it was to secure the existing and not a future balance.

As to the judgment, I see nothing to disentitle the Petitioners to the benefit of it, and I am, therefore, of opinion that it is a charge on the fund in Court, and that the amount of it with interest must be paid out of that fund.

ORDER.

Declare that the deed-poll is only a security for the balances at its date.

Declare that the amount remaining due on the judgment is the first charge upon the fund in Court.

Direct payment to the Petitioners of such amount and costs.

Direct payment of the residue to the trustees of the creditors' deed.

BURY v. OPPENHEIM.

April 28.

A gift by a child to her parent immediately after attaining twenty-one cannot, under ordinary circumstances, be supported.

Sum after attaining twenty-one. a daughter paid her reversionary interest and the amount was received by her father. He and she had determined that the most advantageous course for her to adopt would be to give the money to him to be applied by him in improving and extending his business, in order to increase his estate, and to enable him better to provide for his family after his decease, and she accordingly gave him the money. *Held*, that the father was a trustee of the money for the daughter, and bound to repay it.

UNDER the will of a testator, who died in 1850, all his grandchildren who were living at his death took immediate vested interests in his residuary estate, subject to be divested so as to let in any grandchildren who might be born before the expiration of twenty years from his decease.

Frances, the daughter of the Defendant *Henry Oppenheim*, was one of such grandchildren, of whom there were seventeen.

Frances Oppenheim attained twenty-one in *January*, 1855, and in *July*, 1855, she and her sister sold their shares in the residue to Mr. *Roscoe* for 180*l.* each. At that time they were living with and supported by their father. The sale was arranged by him, and he was made a party to the assignments, and attended at the completion.

Cheques for 180*l.* each were then delivered to *Frances Oppenheim* and her sister. These were afterwards handed to their father, who obtained bank notes, which (as he said) were, "with the free consent" of his daughters, paid into his bankers to his account, "and the amount had since been, with their knowledge and consent, applied by him to his own use, in extending his business."

Frances Oppenheim continued to reside with her parents

parents until *April*, 1856, when she clandestinely married the Plaintiff. She died in *February*, 1857, and the Plaintiff was her administrator.

After her death, the Plaintiff applied to her father for payment of the 180*l.*; but he refused to pay it, alleging that it had been given to him by his daughter.

The Plaintiff instituted this suit, insisting that there had been no gift, and alleging that, "even if the sum of 180*l.* was, in fact, given by *Frances Bury* to the Defendant, such gift was made immediately or very shortly after she had attained her age of twenty-one years, and while she was still under such authority and subject to such influence of her said father as had existed during her minority; that such gift was made (if it was ever in fact made) at the solicitation and under the direction of the Defendant, and in consequence of an undue and improper exercise of his paternal influence and authority. The Plaintiff submitted, that such gift (if made) was not such a transaction as ought to have been permitted to take place, and that it ought to be set aside."

The Plaintiff prayed a declaration of his right to the fund, notwithstanding the alleged gift, and for a decree for payment.

There was considerable evidence entered into by both sides; but the Court relied on the 19th paragraph of the father's answer, which was as follows:—

"After the completion of the said sale, some further conversations took place between my two daughters *Frances* and *Jane* and myself and other members of our family, as to the best manner in which they would apply the moneys arising from such sale; and it was

determined

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determined by my two daughters, of their own free and independent will, that the most advantageous course for them to adopt would be, for them to give the moneys to me, to be applied by me in improving and extending my business, in order to increase my estate, and to enable me better to provide for my family after my decease. My two daughters accordingly gave me the two sums of 180*l.* and 180*l.*, and I gave them each 10*l.* towards their expenses of a visit, which they were about to make to *Margate*."

Mr. *Selwyn* and Mr. *A. E. Miller*, for the Plaintiff, contended, first, that there had been no actual gift of the money; and secondly, that a voluntary gift from a child to a parent, shortly after the latter attained twenty-one, and while under parental control and influence, could not, in equity, be maintained; *Archer* v. *Hudson* (*a*); *Hoghton* v. *Hoghton* (*b*).

Mr. *R. Palmer* and Mr. *Shebbeare*, for the Defendant, argued, first, that the remedy of the Plaintiff to recover the money if there had been no gift was by action at law, and not by suit in equity.

Secondly, that there was distinct evidence of a gift made by the daughter to the father six months after she had attained twenty-one; that the transaction was known to the whole family, and had been communicated to the Plaintiff himself and acquiesced in; that no claim had been made by the daughter in her lifetime, and that none would ever have been made if she had lived.

The MASTER *of the* ROLLS.

The case entirely depends on the evidence. The father,

(*a*) 7 *Beav.* 551. (*b*) 15 *Beav.* 278.

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father, who was not bound to support his daughter after she attained twenty-one years, says, that she made him a free and voluntary gift of all her property. I agree with the observations of Lord *Langdale* in *Archer* v. *Hudson* (*a*), that this Court does not prevent an act of bounty between parent and child; and in *Hoghton* v. *Hoghton* (*b*) I referred to it. I do not mean to say that a gift from a child to a father cannot be supported in any case, it may be, in a proper case, but not in such a one as this, where the daughter gave every thing she had to her father, who might immediately after have turned her out of doors, and where she had no advice or information, and no motive for the act, except to please her father. This case, I think, fails in every requisite which the Court holds necessary in order to support such a gift. It is suggested, in the first instance, that it was given, and, if not, that it was lent, and that in that case the proper remedy is by action at law. I am convinced, that if it was not a gift, it was not a loan. The great distinction between a trust and a loan must necessarily be borne in mind. If the daughter had said to her father, "I will lend you this money," the relation of debtor and creditor would have been constituted, and the father would have owed her 180*l.*; but if the money was given to the father, to be invested by him and applied for the benefit of his daughter, and she was to have the produce, then it was strictly and properly a trust. There is also this distinction:—if he took the money as debtor, he became bound to pay interest; but if he took it as trustee, he was only bound to account for the produce.

On the answer it is very difficult to say that it was not the latter. In the 19th paragraph of his answer, the Defendant

(*a*) 7 *Beav.* 556. (*b*) 15 *Beav.* 300, 306.

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Defendant says, "After the completion," &c. [*ante*, p. 597]. If so, there was an implied contract of some description. "The most advantageous course for" the daughter was to be adopted; and for that purpose it was given to him, to enable him the better to provide for his family. There was, therefore, some trust for the benefit of the daughter, and it would be difficult to say, after this, that if the father, whom she had entrusted with the money, had turned her out of his house, she would not have had some claim on him in respect of this money. This is the case of a young woman of the age of twenty-one years and a few months; what would any son do under such circumstances except ask his father what he should do with the money. It is impossible that the father can put the case in any other way, than that he has received it for her benefit, and I have no doubt that it was supposed that this would be for the benefit of all the family. This is not a transaction which can be sustained, by which the father claims it exclusively; I think that the statement of the father, in his answer, is sufficient to decide the case.

The result is, that the Plaintiff must have a decree against the Defendant for repayment of the money, with interest at 4*l.* per cent., setting off the amount paid during life of the daughter, and with costs.

1859.

SPENCE *v.* BRISCOE.

March 16.

A judgment at law being given to be dealt with by this Court: *Held*, that a charging order ought not to be obtained on such judgment without the leave of this Court.

THE Plaintiff in this suit was ordered to give the Defendant judgment in an action at law, such judgment to be dealt with by this Court. A judgment was accordingly given by the Plaintiff. After this, the Defendant, without any leave of this Court, obtained from the Court of Law an order charging a trust fund belonging to the Plaintiff.

The MASTER *of the* ROLLS held, that the charging order ought not to have been obtained without the leave of this Court. He directed the Defendant to discharge it at his own expense, and to pay the costs of the present application.

Mr. *Follett* for the Plaintiff.

Mr. *Osborne* for the Defendant.

1859.

April 21, 27, 30.

FULLER *v.* REDMAN. (No. 1.)

By the 4 & 5 *Will.* & *M.* c. 20, judgments not docketted were not to have any preference against executors, &c. in the administration of estates. The 2 & 3 *Vict.* c. 11, closed the docket. *Held*, that the old law was thereby revived, and that the administrator had committed a *devastavit* by paying a simple contract debt before a judgment debt, even though he had no actual notice of the latter.

IN 1845, a judgment was entered up against the testator *George Redman*, but it was not docketted. The testator died in 1855, and letters of administration were granted to the Defendant *John B. Redman, cum testamento annexo.*

In *February*, 1856, a claim was filed for the administration of the estate, and on the 23rd of *April*, 1856, the judgment creditor registered his judgment in the Common Pleas, under the 1 & 2 *Vict.* c. 110. A decree was made in *July* following, and it having appeared that the assets were deficient, and that the administrator had paid simple contract creditors of the testator, to the extent of 174*l.* 17*s.* 8*d.*, the judgment creditor now sought to have that sum disallowed to the administrator as a proper payment.

Mr. *R. Palmer* and Mr. *C. C. Barber*, for the judgment creditor.

At common law, the administrator was bound to take notice of the judgment debt, and the payment of a simple contract debt before one of higher value was a *devastavit*, for which he became personally liable; *Littleton* v. *Hibbins* (*a*). The 4 & 5 *Will.* & *Mary*, c. 20,

(*a*) *Cro. Eliz.* 793.

DATES.

1839. Act of 2 & 3 *Vict.*
1845. Judgment.
1855. Death.
1856, *April*. Judgment registered.
July. . Decree.

20, afterwards made perpetual by the 7 & 8 *Will.* 3, c. 36, s. 3, removed this hardship, by requiring judgments to be docketted, and enacting, "that no judgment, not docketted and entered in the books as aforesaid, shall affect any lands or tenements, as to purchasers or mortgagees, or have any preference against heirs, executors or administrators, in the administration of their ancestor's, testator's or intestate's estates."

The 1 & 2 *Vict.* c. 110, ss. 13, 19, does not affect the question, but merely the rights of "purchasers, mortgagees and creditors, as against the lands of the judgment debtor."

The 2 & 3 *Vict.* c. 11, s. 1, enacts, "that no judgment shall hereafter be docketted under the 4 & 5 *Will.* & *Mary*, c. 20, and that all such dockets shall be finally closed. There is, therefore, no necessity for or possibility of docketting, and the common law is revived; notice to the administrator is immaterial; *Williams on Exors.* (*a*).

Mr. *Lloyd* and Mr. *De Gex, contrà.*

Even, if it could be maintained that the law in force antecedent to the 4 & 5 *Will.* & *Mary*, c. 20, was restored by the 2 & 3 *Vict.* c. 11, it is by no means clear, that the law at that time was so unreasonable and unjust as is contended on the other side. In *Anon.* (*b*), it is said, "*le ley n'est cy unreasonable que un prender notice a son perrill de chose le que ill ne poit per ascun resonable intendment aver notice*," and the Court, either laying down or acceding to that proposition, held that the executrix should not be charged with a judgment of which she had no notice. This case appears to have been decided in the same term as *Littleton* v. *Hibbins*, but it appears by the

(*a*) *Vol.* 2, *p.* 927 (*5th ed.*) (*b*) 2 *Anderson*, 159, *pl.* 87.

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the same report, that a case of *Bereblock* v. *Rode* was subsequently decided in the same way, in *Michaelmas Term*, 44 & 45 *Eliz.*; and this seems to have been the better decision, for afterwards in *Harman* v. *Harman* (*a*), *Trinity Term*, 1 *Jac.* 2, the Court relied on the case reported in *Anderson's Reports*, saying, "so where an obligor did afterwards enter into a recognizance in the nature of a statute, and judgment was against him upon the bond, and then he died, his executrix paid the creditor upon the statute, and the obligee brought a *scire facias* upon the judgment on the bond debt, and she pleaded payment of the recognizance; this was held a good plea, for she is not bound to take notice of the judgment against the testator, without being acquainted therewith by his creditors, for she is in no wise privy to his acts."

But secondly, the 2 & 3 *Vict.* c. 11, did not restore the old law. That act, by inadvertence, as it must be supposed, omitted to provide for the consequences of closing the dockets. The question would be, who is to suffer by the inadvertence of the legislature. Ought the 4 & 5 *Will.* & *Mary*, c. 20, to be held to be repealed without any intimation to that effect being expressed in the 2 & 3 *Vict.* c. 11, the consequence of which would be, to subject executors to great hardship and injustice, if the present view taken by the judgment creditor of the old law be correct; or ought it not rather to be considered, that judgments are possibly inadvertently, but certainly not inequitably or unjustly, reduced by the 2 & 3 *Vict.* c. 11, to the level of other debts? Surely the latter is the less inconvenient result of the inadvertence of the legislature; at the very least, it must be considered, that when the legislature closed the dockets, it

(*a*) 3 *Mod.* 115.

it did so because their object was answered by the new registry provided by that act, and by the 1 & 2 *Vict.* c. 110, and a judgment creditor who, as in the present instance, has omitted to register, cannot, in a Court of Equity, be entitled to recover from an administrator a sum which the latter has paid without the possibility of being acquainted with the judgment debt; the judgment creditor having, through his own negligence, allowed his debts to remain undisclosed.

The MASTER *of the* ROLLS.

April 30.

This question, arising in the administration of assets, is, whether the administrator with the will annexed of a testator ought to be allowed, in passing his accounts, as against a judgment creditor of the testator, a sum of 174*l.* 17*s.* 8*d.*, which he paid in discharge of the testator's simple contract debts, or whether the judgment debt ought not to have priority over the simple contract debts.

The question is one of considerable singularity, arising from the oversight of the legislature in the statutes which it has passed. According to the old law, as laid down in the case of *Littleton* v. *Hibbins* (*a*), no simple contract debt could be paid or could be allowed as against a judgment debt entered up. That decision seems to have been founded on a fiction of the law, which held that everything that was of record was known or was supposed to be known to everybody. Every one was presumed to have notice of everything that was of record, in the same way that everybody is bound by a public Act of Parliament,

(*a*) *Cro. Eliz.* 793.

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ment, though he knows nothing whatever of it. To remedy that defect, the 4th & 5th of *Will. & Mary*, c. 20, was passed, which enacted, that no judgment which was not docketted and entered in books kept for that purpose should have any preference against heirs, executors or administrators in the administration of assets. Then came the Act for the abolition of imprisonment for debt (1 & 2 *Vict.* c. 110, s. 19), which enacts, that no judgment shall, by virtue of that Act, affect any lands "as to purchasers, mortgagees or creditors," unless and until a memorandum, in the form there stated, shall be left with the Senior Master of the Common Pleas.

But the act does not use the words used in the statute of *Will. & Mary*, or words to that effect, namely, that it shall not, until so registered, have preference against an heir, executor or administrator over any other debts in the administration of assets. In that state of the law, of course, the old law remained untouched.

But then comes the 2 & 3 *Vict.* c. 11, s. 1, which puts an end to and prevents any docketting from taking place under the statute of *Will. & Mary*. The consequence is, that no dockets at all can now be entered, and the result is, that it practically puts an end to the possibility of making a docket, and puts, therefore, an end to the application of that statute. Having made no provision with respect to the preference against heirs, executors and administrators in the administration of assets, the question arises, what is to be done in that state of things? I am of opinion, that the old law is restored and must remain exactly as if the statute of *Will. & Mary* had been simply repealed, and, so far as

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as this question is concerned, had been simply put an end to.

What the old law was is really not in doubt; for although Mr. *Lloyd* argued that subsequent cases cast some doubt upon *Littleton* v. *Hibbins* (*a*), still, in fact, they are all consistent with it. What makes it more clear is this:—that it was to remedy that very defect in the law that the Act of *William & Mary* was passed. These judgments being matters of record, and having, by law, a preference as against heirs, executors and administrators, it was in order to prevent that occurring, unless through a docket properly kept in a book for that purpose, facility and means should be given to persons to ascertain what judgments there were, instead of going and searching the whole of the judgment rolls, which would have been a very fatiguing and troublesome process. That being so, and dockets being put an end to by the 2 & 3 *Vict.* c. 11, I am of opinion that the old law is restored, and that I have no option on the subject. If I could help it, I would not have disallowed to the administrator moneys which he has *bonâ fide* paid in payment of debts, as against a debt due on record, of which he really had no notice.

I purposely pass by the question whether he had notice or not. The evidence on that point was extremely imperfect, and was merely inferential.

Even assuming that the administrator had no notice, I think that the law is against him on this subject, and that I have no power to allow these payments in the administration of assets. The certificate must therefore be corrected.

(*a*) *Cro. Eliz.* 793.

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PRETTY *v.* SOLLY.

Jan. 24, 29.

Rules of construing statutes, where a general enactment in it would override a particular one, and where two parts of it are contradictory.

The word "soil" in an Inclosure Act *held* to mean "surface."

Specific performance of a contract for sale of lands held under an Inclosure Act refused, it appearing upon the context that the right of the lord to the minerals in the allotted lands had not been affected by the Act.

An Inclosure Act directed allotments for public and specific purposes, and that one-fifth should be allotted to the lord of the manor for his interest in the "soil," and that the remainder of the common lands should be divided amongst the commoners, to be held in severalty. And it was declared that the lords' seignorial rights were not to be prejudiced, except the right to the "soil," and that the lord might thereafter enjoy all rents, heriots, &c., "and all mines, minerals, quarries and other royalties," and as if the Act had not been passed. *Held*, that the lord retained his rights to the mines and minerals under the land allotted to the commoners in severalty.

THE Defendant agreed to purchase from the Plaintiffs a small piece of freehold land, with a cottage erected thereon, which had formerly been allotted by the commissioners under an Inclosure Act of the 45 *Geo.* 3, c. xcii.

The Defendant insisted that the Plaintiffs had not shewn a right to the minerals, and he refused to complete.

The Plaintiffs thereupon instituted this suit for a specific performance; and a reference was made as to title. The Chief Clerk found, that a good title could be made to the allotment, cottage and premises, except as to the mines and minerals (if any) under them, to which a good title could not be made.

A motion was made by the Plaintiffs to vary the certificate.

The question turned on the terms of the Act of Parliament, the material parts of which were as follows:— It recited that there were (1) common meadows, (2) a tract

tract of waste, called *Canford Heath*, of 9,000 acres, (3) waste lands in *Poole*, and (4) waste mudlands. That Mr. *Arrowsmith* claimed to be the lord of the manor and to be entitled "*to the right of soil*" of and in the lands, subject to the rights of common, &c., and that "it would be advantageous to the several proprietors and persons interested in the said common meadows, heaths, waste lands and commonable ground, "if the same were divided, and specific parts thereof allotted in proportion to the property, rights of common and other interests of the proprietors therein;" and the mudlands were allotted, &c. It then appointed commissioners, with the usual powers.

By the 14th section, all the expenses of carrying the act into execution were to be paid by a sale of the waste.

By the 17th section, the commissioners were to allot to the surveyors of the highways "such parts and parcels of the heath and waste lands thereby directed to be *divided* and enclosed" as they should think proper, "as and for public watering places for cattle, and for stone and gravel pits, sand and clay pits, and for laying and depositing manure and rubbish," and which allotments were, for ever thereafter, to be used by the surveyors of the highways.

The 19th section directed an allotment not exceeding two acres to be made to the corporation of *Poole*, for supplying the town with water, for the purpose of erecting a conduit head. The 20th directed an allotment for a turf common for the cottages and tenants within each tything.

The 21st, 22nd, 23rd and 24th sections directed allot-

 ments

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ments "of the said waste lands" directed to be "divided" in lieu of tythes.

The 27th section directed the commissioners to allot one-sixteenth of the waste lands that should remain unto *Edward Arrowsmith*, lord of the manor of *Great Canford*, "in lieu of and in full compensation for his and their right and interest in and to the *soil* of the said waste lands respectively, which shall be awarded by the said commissioners to be divided and allotted under and by virtue of this act."

The 28th section directed a certain allotment of the residue to be made to certain corporations in *Poole;* and the 29th directed the commissioners, (after making the above allotments,) to "divide, set out and allot" all such parts of the said common meadows and other commonable lands, and also of the residue of the said waste lands, intended by this act to be divided and allotted, as shall in their judgment be fit and proper to be divided, allotted or inclosed, to be held in severalty unto and for the several proprietors thereof, and persons interested therein, in satisfaction of their rights of, in, over and upon the common meadows, commonable lands and waste lands so to be divided and allotted.

The 58th section was as follows:—"And be it further enacted, that nothing in this Act shall extend or be construed to extend to prejudice, lessen or defeat the right and title of the said *Edward Arrowsmith*, his heirs or assigns, trustee or trustees as aforesaid, as lord or lords of the said manor of *Great Canford*, of, in or to any seignories, royalties or other manorial rights incident or belonging thereto (other than *and except the right*

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right to the soil of the waste lands, for which a compensation is hereinbefore directed to be made); but that the said *Edward Arrowsmith* or the lord or lords of the said manor for the time being, and all persons claiming by, from, under or in trust for him and them, shall and may, from time to time and at all times for ever hereafter, have, hold and enjoy all rents, heriots, forfeitures, services, fines, courts, perquisites and profits of courts, and *all mines*, minerals, quarries and other royalties, jurisdictions and privileges to the said manor incident, appendant, belonging or appurtenant (except clay and the right to the *soil* as aforesaid), in as full, ample and beneficial a manner, to all intents and purposes whatsoever, as he and they might or ought to have held and enjoyed the same in case this Act had not been made."

Mr. *R. Palmer* and Mr. *Jolliffe*, for the Plaintiffs, contended, that the word "soil" in the 27th section of the act included mines and minerals, and that the lords being compensated by the allotment directed to be made to them by that section, for their right and interest in the mines and minerals in the waste lands, as part of the soil, they must be treated as excepted from the reservation of the lords' rights contained in the 58th section, and, consequently, that they belonged to the commoners to whom the waste lands were allotted.

Mr. *Lloyd* and Mr. *Hemming*, for the Defendant.

The following cases were cited:—*Riddell* v. *White* (*a*); *Ward* v. *Cecil* (*b*); *Townley* v. *Gibson* (*c*); *Micklethwait* v. *Winter* (*d*).

The

(*a*) 1 *Ans.* 281.
(*b*) 2 *Vern.* 711.
(*c*) 2 *Term R.* 701.
(*d*) 6 *Exch.* 644.

[illegible] The Master of the Rolls.

[illegible] The question in this case arises on the construction of [illegible] and depends on the operation and effect of the [illegible] section of that Act.

The general rules which are applicable to particular and general enactments in statutes are very clear, the only difficulty is in their application. The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply (a).

Again, wherever two parts of a statute are contradictory, the Court endeavours to give a distinct interpretation to each of them, by looking at the context.

The question upon this Inclosure Act arises in this way:—the act relates to certain interests of the lord of the manor of *Canford*, by the 58th section it reserves to the lord of the manor all manorial rights, except the right to the *soil*, and enacts that he may thenceforth hold and enjoy all rents, &c., "and all *mines*, minerals, quarries," &c. incident to the manor ("except clay and the right to the soil as aforesaid"), as if the act had not been made.

The question is, whether this clause extends to the interest of the lord in all the lands inclosed under this Act

(a) *See Standen* v. *The University of Oxford*, *Sir W. Jones*, 17; *Bonham's Case*, 8 *Co. Rep.* 118 *b*; *Churchill* v. *Crease*, 5 *Bing.* 180.

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Act of Parliament, or only to a portion of them. If it is expressly stated, in other parts of the act, that the mines and minerals are contained in the enactments before mentioned; and if there are other parts of the act to which this general clause would apply, I should be of opinion that the general clause would not affect the previous particular enactment. It is, therefore, necessary to observe what the act professes to do. It recites, in effect, that there are four different sorts of property to be inclosed, namely, certain common meadow, *Canford Heath*, lands in the town of *Poole* and mudland; and the mode in which it deals with them is as follows:—

The 12th section gives directions as to how the old enclosures are to be dealt with, the 17th and 19th directs allotments to be made for public purposes, including a conduit head, and the 20th section directs the second allotment for turbary for the cottagers, and the sections from 21 to 24 direct the third allotments which are in lieu of tithes. Then comes the 27th section which directs the fourth allotment to the lord of the manor, in lieu of his right and interest in the soil of the waste lands. The 28th directs the fifth allotment of certain lands to the town of *Poole*, and the 29th section directs the sixth allotment of the residue for the benefit of the commoners. Then comes the 58th, or the special saving clause, what is in these words [see *ante*, p. 610].

The question is, whether the reservation of minerals extends to all the lands enclosed in which the lord has any interest, or is confined to certain, and if so, to what portions of them.

I think I can dispose of the cases cited, none of them are precisely in point. In one case (*a*), the mines were not

(*a*) *Townley* v. *Gibson*, 2 *Term Rep.* 701.

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PARTTY v. SOLLY.

not reserved to the lord, and there can be no question, that that case would apply, if the words "mines and minerals" were not specially mentioned in the 58th clause, and the lord's right to them had been disposed of by previous clauses. The 29th section, which directs the allotments to be made to the commoners, and the 27th, which gives compensation to the lord for his right to the soil, are quite general, and it is clear, that if the question depended on those two sections alone, they would necessarily include all the minerals, but the 58th clause says, that nothing therein contained shall prejudice the lord's right to the mines and minerals.

It is said, that the 58th section does not apply to or include the waste lands when enclosed and allotted to the commoners, because, by the special enactment (the 27th) a compensation is provided for the lord for his interest in these lands, and that there are other lands to which this section may apply, namely, those which are to be allotted for public purposes, and to provide fuel for the cottagers, as to which, nothing is done to disturb the right of the lord to the minerals.

I cannot, however, see any thing to limit this 58th section, and I think so the more, from the peculiar use of the word "soil." *Primâ facie* it would include every thing above or below it, but the word "soil" is throughout this act used as distinct from the word "land."

The 6th section authorizes the commissioners to determine any dispute of any parties "interested in the said lands," but not their title, and the 7th declares the determination of the commissioners, touching the right of the soil, to be final. My impression is, that in this Act of Parliament the use of the word "soil" is distinct from "land."

This

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PRETTY v. SOLLY.

This act directs, that the allotment to be made to the lord is to be "in lieu of and in full compensation for" his "right and interest in and to the soil." Now, referring to the dictionaries, I find that *Johnson's* second definition of the word "soil" is, "earth considered with relation to its vegetative qualities." And in *Richardson*, the definition of the word is this:—"The earth, land, ground; land with reference to its produce."

There is a clear distinction between "soil" and "land" (*a*).

I think the word "soil" throughout the act is used as equivalent to "surface," though if the question rested on the 27th and 28th sections alone, without the 58th or saving clause, I should have held, that the word "soil" included the minerals, and that these sections deprived the lord of his right to them. But I see nothing in these clauses, or in the act, to limit the operation of the 58th section, and I cannot, without introducing additional words into that section, limit its operation to the mines under one species of allotment more than another; they are all given alike, and the 27th clause, giving the lord compensation for his right to the soil of all the lands awarded, is consistent with this view, and with the distinction between the words "land" and "soil" as used in the act.

The Chief Clerk's certificate must, therefore, be confirmed.

On further consideration, the bill was dismissed with costs.

(*a*) *Webster's* 3rd definition of soil is—"3. The upper stratum of earth; the mould or that compound substance which furnishes nutriment to plants, or which is particularly adapted to support and nourish them."

1859.

FULLER v. REDMAN. (No. 2.)

April 21, 27.

In taking the accounts in an administration suit, any creditor may object that another creditor's debt is barred by the Statute of Limitations; but, *semble*, that such an objection cannot be taken to the Plaintiff's debt, which is the foundation of the decree.

THE testator, Mr. *Redman*, died in 1855, and in *July*, 1856, a decree was made for the administration of his estate. Under this decree, the executors of Mr. *Turner* came in and claimed a debt of 178*l*., as due from the testator Mr. *Redman*.

Messrs. *Atkinson*, who were other creditors, objected to the admission of *Turner's* debt, on the ground that it was barred by the Statute of Limitations. It appeared from the testator's ledger, that a balance of 162*l*. was due to *Turner* in 1843; this was the last entry establishing the debt, but the circumstances relied on, as taking the case out of the statute, were as follows:—

A mere letter of licence by a creditor to his debtor does not suspend the operation of the Statute of Limitations.

An acknowledgment to take a case out of the Statute of Limitations must be made to the creditor; and, *semble*, that one to his agent is sufficient.

In 1847, Mr. *Redman* being insolvent, his creditors gave him a letter of licence, dated the 27th of *November*, 1847.

Such letter of licence was in the following terms:—"Mr. *Geo. Clutering Redman*, of *Lime Street*, merchant, having proposed to us, the undersigned his creditors, to devote himself, for a period of three years from this date, under the direction of inspectors, to prosecute his claims upon Government and to realize his assets to the best advantage, and having also offered to apply, to the liquidation of his debts, such part of any salary or profits in business he may receive during the said period of three years, as his inspectors may think proper, we do hereby agree to grant him a letter of licence for three years, and to give the inspectors, or the

the majority of them, authority to release Mr. *Redman* from our respective debts, at any time during the last three months of the term of three years, upon his assigning to the inspectors, in trust for his creditors, any of the assets which shall not have been collected, provided the inspectors shall be satisfied that the said *Geo. Clavering Redman* hath, in all respects, performed the agreement on his part. And we further agree to execute any deed for carrying this arrangement into effect, which shall be approved of by the inspectors. And we agree to *Geo. Fred. Young*, *Wm. Hutton* and *Geo. Fuller* being the inspectors. Dated this 27th day of *November*, 1847.

The letter of licence was executed by several persons and firms, about thirty in number, including *Turner*. The amount of his debt was not stated, but that was supplied from the debtor's ledger.

Redman accordingly prosecuted his claims but without success. Afterwards, by a deed bearing date the 4th of *November*, 1850, but really executed after the expiration of the three years, *Redman* assigned all his property to the inspectors in trust to pay the creditors who had executed the letter of licence. And the inspectors thereby released him from the debts of those creditors who had signed the letter of licence. This deed was executed after the expiration of the three years and without notice to or communication with the creditors.

The Chief Clerk allowed the debt, but Messrs. *Atkinson* took out a summons to vary the certificate, so far as it found that the executors of *Turner* were creditors for 178*l.* by striking the same out as disallowed.

The

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The case was adjourned into Court.

Mr. *R. Palmer* and Mr. *C. C. Barber*, for Messrs. *Atkinson*, argued, that the letter of licence and deed were not, in form, sufficient to take the case out of the Statute of Limitations; secondly, that the acknowledgment necessary for that purpose must be made to the creditors and not to a third party; thirdly, that the deed of 1850 was invalid, but, if valid, then that it operated as a release of the debts.

Mr. *W. Pearson*, for the executors of *Turner*.

The debt is still existing and is not affected by the Statute of Limitations. The executors are not bound to raise that objection to existing debts; they alone have a right to plead the statute, and mere creditors are not entitled to interfere and put forward that objection. Secondly, the instruments executed by the debtor suspended the operation of the statute. Thirdly, they amount to an "acknowledgment" in writing of the debt, from which a new promise to pay will be inferred.

Mr. *Lloyd* and Mr. *De Gex* for the executors.

The following cases were cited:—*Tanner* v. *Smart* (a); *Hart* v. *Prendergast* (b); *Sidwell* v. *Mason* (c); *Mountstephen* v. *Brooke* (d); *Eicke* v. *Nokes* (e); *Baillie* v. *Lord Inchiquin* (f); *Grenfell* v. *Girdlestone* (g); *Halliday* v. *Ward* (h); *Cheslyn* v. *Dalby* (i); *Smith* v. *Poole* (k); *Edmonds* v. *Goater* (l); *Howcutt* v. *Bonser*

(a) 6 *Barn. & C.* 603.
(b) 14 *Mees. & W.* 745.
(c) 2 *Hurl. & N.* 306.
(d) 3 *Barn. & Ald.* 141.
(e) *Moo. & M.* 303.
(f) 1 *Esp.* 435.
(g) 2 *Younge & C.* (*Exch.*) 662.
(h) 3 *Camp.* 32.
(i) 4 *Younge & Coll.* 238.
(k) 12 *Sim.* 17.
(l) 15 *Beav.* 415.

ser (*a*); *Williams* v. *Griffith* (*b*); *A'Court* v. *Cross* (*c*); *Hart* v. *Prendergast* (*d*); *Moodie* v. *Bannister* (*e*); *Everett* v. *Robinson* (*f*); 21 *Jac.* 1, *c.* 16, *s.* 3; 9 *Geo.* 4, *c.* 14; 3 *&* 4 *Will.* 4, *c.* 42, *s.* 5.

The MASTER *of the* ROLLS.

The first point raised by Mr. *Pearson* is, that it is not open to any one but the executor to set up the defence of the Statute of Limitations. That appears to be contrary to what I have on all occasions considered to be the result of the authorities. I refer to two decisions on the subject. In *Ex parte Dewdney* (*g*), Lord *Eldon* said:—"In the administration of assets under a creditor's bill, executors are not bound to plead the Statute of Limitations; and if they do not, the creditor filing the bill will have a decree on behalf of himself and all other creditors, and will be paid; but the constant course in the Master's office is to take the objection against other creditors, and to exclude from the distribution those who, if legal objections are brought forward, cannot make their claims effectual."

What I take to be the meaning of that passage is this,—if any person comes in and takes the benefit of a decree obtained by a creditor whose claim would have been barred by the Statute of Limitations, he shall not be at liberty to set up the statute against the Plaintiff whose claim is the foundation of the decree; but he may as against any other person, although the executors do not bring forward that objection.

The same view of the case seems to have been taken in

(*a*) 3 *Exch. Rep.* 491.
(*b*) *Ibid.* 335.
(*c*) 3 *Bing.* 329.
(*d*) 14 *Mees. & W.* 741.
(*e*) 4 *Drew.* 432.
(*f*) 4 *Jur. N. S.* 1083.
(*g*) 15 *Ves.* 498.

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in *Briggs* v. *Wilson* (*a*), by Lord Justice *Turner*. He says:—"If, therefore, the Statute of Limitations had been set up in this case, I should have thought that this 500*l*. note was barred, both as to the real and personal estate. But the Defendant, who is both executor and devisee in trust, has not set up the statute; and as to the personal estate, it is not, I think, competent to the parties moving before us, who, as to that estate, are merely in the situation of residuary legatees, now to set it up against the Plaintiff in this suit, whatever may be their right as against other creditors." In the case of *Shewen* v. *Vanderhorst* (*b*), under the common decree in an administration suit, a creditor applied to prove a debt which was barred by lapse of time, and the executors refusing to interfere, the Plaintiff, a residuary legatee, insisted on setting up the objection of the statute. It was held, that it was competent for the Plaintiff, or any other party interested in the fund, to take advantage of the statute before the Master, notwithstanding the refusal of the executors. This case was first decided by Sir *John Leach*, and it was afterwards affirmed by Lord *Brougham*. There is certainly a distinction between the case of a Plaintiff who is allowed, at a considerable expense, to obtain a decree against the executor for the benefit of all the creditors where a creditor comes in under that decree and attempts to contest the propriety of the decree of which he obtains the benefit, and the case of other creditors who come in to prove their debts under that decree.

I do not consider the case of *Briggs* v. *Wilson* (*c*) an authority against the cases I have referred to, to shew that any person interested may not, as against others, enforce the Statute of Limitations; and in *Moodie* v. *Bannister*,

(*a*) 5 *De G., M & G.* 21.
(*b*) 1 *Russ. & Myl.* 347, *and* 2 *Russ. & Myl.* 75.
(*c*) 5 *De G., M. & G.* 12.

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Bannister, Vice-Chancellor *Kindersley* was of opinion that it was competent to the other creditors, or to any person interested in the estate, to take the objection, though the executor should neglect or decline to do so. It is a different thing when judgment has been obtained against the executor, or where he has known nothing of the objection and has paid the debt.

The question then really is, whether this debt is barred by statute. On this there are two points raised; first, upon the construction of the instrument of 1847, which was a letter of licence and a contract not to sue for three years, and it is said that this suspended the operation of the statute for those three years. I dissent from this. If there had been a covenant against setting up the statute for six years after the expiration of the licence, it would be so; but unless provided against, the statute runs from the time when the debt accrued.

The other point which is raised to take this debt out of the operation of the statute is, that there is an acknowledgment of the debt by the deed of *November*, 1850. I am of opinion that this amounts to no acknowledgment at all, and that it does not restore the liability of the debtor. I dissent from the argument that equity differs from a Court of Law in the view it takes of these cases; it is a legal demand, and if the debt cannot be proved at law, neither can it in equity. It does not rest on equitable, but entirely on legal grounds; and, on questions of debt or no debt, the Court often allows an action to be brought to try whether it can or cannot be sustained; if it can, the Court admits the debt as against the estate. The real question is, whether this amounts to an acknowledgment or a promise to pay the debt. I have always understood that, since Lord *Tenterden's* Act, the acknowledgment or promise to pay must be

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be made to the creditor. There might have been some question whether an acknowledgment if made to an agent of the creditor is not made to him. The recent statute (a) removes all difficulty as to promises by the agent of the debtor. However, in equity, it would be considered, that if an application were made by the solicitor of the creditor, and the debtor wrote to say that he would pay the debt, it would be the same as if he had made the promise to the creditor himself.

There either must be a promise to pay, or an acknowledgment of the debt, from which the law infers a promise to pay, as if a man says, "I owe you 10*l.*" it is not necessary to prove a promise to pay, for it is the necessary legal inference that he means to pay it. But if the acknowledgment be not plain and simple, but accompanied by something else conditional, no absolute promise to pay can be implied. In *Edmonds* v. *Goater* (b), I treated it as essential that there must be a promise to pay.

But here is a case, in which the inspectors had power to release certain debts within the last three months of the three years; provided all his property was assigned to inspectors. The debtor executes a deed after that time, by which he purports to assign his property, and the inspectors release the debts of the creditors. The deed is not stamped nor acted on, nor are any proceedings taken on it. Even if it had been, I should be of opinion that it is no acknowledgment to the creditors, and that it comes within the Exchequer cases, which hold that the acknowledgment must be made to the creditors, and that a letter to a mere stranger will not do. This deed is a mere agreement with other persons. I think, therefore, that the finding is wrong, and that the debt must be expunged.

(a) 19 & 20 *Vict. c.* 97, *s.* 13. (b) 15 *Beav.* 415.

GREATED *v.* GREATED.

March 9, 11, 16.

THE testator *Timothy Greated*, by his will dated in 1834, made some bequests to his wife, *Mary Ann Greated*, and he further declared, that she should have one-third part of the net annual rents and profits (which he considered as or in lieu of her dower), for and during the term of her natural life, out of his real estates thereinafter disposed of, and which one-third net annual rental the testator devised and bequeathed to her accordingly. He afterwards proceeded as follows:—"with respect to my real estate, consisting of house and premises No. 13, *Ely Place*, in the county of *Middlesex*, houses and premises at *Ball Court*, *Giltspur Street*, (being Nos. 1 to 4 in said court,) in the city of *London*, and houses and premises, land, ground-rents &c. at *Stockwell*, *South Lambeth*, in the county of *Surrey*, as devised to me by my late sister, I give, devise and bequeath *to them and their heirs for ever* as follows, viz., to *Charles Augustine Greated* five thirtieth parts, to *Joseph Greated* four ditto, to *Timothy Greated* four ditto, to *James Greated* four ditto, to *William Arthur Greated* four ditto, to *Elizabeth Greated* three ditto, to *Catherine King Greated* three ditto, to *Emily Greated* three ditto, to hold the same as tenants in common, and not as joint tenants; *and in the event of any of them dying before having heirs of their body or making a particular disposition* of his or her property, then and in that case his or

A testator devised real estate to his children and their heirs as tenants in common, with a gift over to the survivors "in the event of any of them dying before having heirs of their body *or* making a particular disposition" of his share. *Held*, that "or" must be read "and," and that the children took in fee, but that the gift over in the event of making no disposition was repugnant and void.

A testator gave one-third of the rents of his real estate to his widow for life, and he devised an estate at *B.*, in thirtieth parts, to his children as tenants in common. The residue of his real and personal estate, "after paying his mortgage and other debts," he left to be divided into thirtieth parts, and to be taken by the same and in the same proportions as the estate at *B.* *Held*, that the widow took no interest in the personalty, and that the mortgages were payable primarily out of the residue and not out of the mortgaged estate, under the 17 & 18 *Vict.* c. 113.

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or her share to go to the survivors in the same proportions, as aforesaid, as the survivors may bear to each other." He then provided for any other child or children being born to him (which never happened), and proceeded thus:—"The rest and residue of my real and personal estate, after paying my mortgage and other debts and funeral expenses, I leave also to be divided into thirtieth parts, and to be taken by the same, and in the same proportions and with the same provisoes, as the estates particularly mentioned are given, devised and bequeathed."

In 1850, the testator made a codicil to his will, whereby he declared, that any freehold property which he might have acquired by devise or purchase, since the execution of his will in *July*, 1834, should fall into the residue, subject to the dower of his wife *Mary Ann Greated*. And he gave, devised and bequeathed the same to pass as if in possession at the period of the date thereof.

The testator died in *July*, 1858, but, in the meantime, two of his children, *Elizabeth* and *William Arthur*, had died without having been married; *Elizabeth* in 1846 and *William Arthur* in *January*, 1858.

The property in *Ball Court* was subject to a mortgage of 750*l.*, and a freehold house in *Charles Street*, of which the testator was seised, was charged with an annuity of 50*l.*

Several questions arose as to the construction of the will and codicil, and one of which was, whether the testator's sons took estates tail or estates in fee with an executory devise over in their respective original shares of the testator's real estate. A second question was,

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was, who were entitled to the original share of *William Arthur Greated* and *Elizabeth Greated*, and whether the surviving sons took an estate in fee in their respective shares of such two original shares. A third question was, whether the widow was entitled to a life interest in one-third of the residue of his personal estate and the after-acquired realty.

Mr. *R. Palmer* and Mr. *Jessel*, for the two Plaintiffs (the sons and executors of the testator).

The devise is to the testator's children and their heirs, with a gift over to the survivor "in the event of any of them dying before having heirs of their body or making a particular disposition." This is a devise to them in fee with a valid executory devise over in the events specified, and therefore the shares of *Elizabeth* and *William*, who died in the life of the testator, went over to the surviving children. In the sentence specifying the events on which the gift over was to take effect, the word "or" must be read "and;" *Eastman* v. *Baker* (*a*); *Morrall* v. *Sutton* (*b*); *Denn* d. *Wilkins* v. *Kemeys* (*c*); *The Incorporated Society* v. *Richards* (*d*).

The gift over to the survivors will, therefore, take effect on the happening of the two events contemplated, and there is nothing in either of them to render it invalid. The gift over to the surviving children in the first event of any children "dying before having heirs of their body" is perfectly valid; for the first gift is to a class of persons then *in esse* with a gift over to the survivors, which must take effect within proper limits, whether survivorship points to the death of the child or

(*a*) 1 *Taunt.* 174.
(*b*) 1 *Phill.* 551.
(*c*) 9 *East*, 366.
(*d*) 1 *Dru. & W.* 258.

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or of the testator; *Ive* v. *King* (*a*); *Newton* v. *Barnardine* (*b*).

The codicil of 1856 brings the will within the operation of the 1 *Vict.* c. 26, but the 29th section, limiting a general failure of issue, does not apply; for the word which is used seven times over in that section is "issue,"—here the expression is "heirs of body," which is not the same thing. Again, the section does not apply where the words are not the same or when the word "issue" is qualified, as "dying without issue under twenty-one;" *Morris* v. *Morris* (*c*); *Harris* v. *Davis* (*d*).

If this be an indefinite failure of heirs of the body, then the children may possibly take an estate tail, with a devise over by way of remainder; for when there is a devise to *A.* and his heirs, and, if he dies without issue, to *B.*, *A.* takes an estate tail: this has been settled by innumerable authorities; *Jarman on Wills* (*e*). The other event of dying without making a disposition is equally valid; *Doe* d. *Stevenson* v. *Glover* (*f*); *Beachcroft* v. *Broome* (*g*).

Again, the "disposition" confers a mere power, or may mean a disposition by will, in either of which cases the gift over in default would be valid.

The fact of the death of the two children in the lifetime of the testator, and the lapse of the interest intended for them, does not invalidate the ulterior devise, but accelerates it; *Avelyn* v. *Ward* (*h*); *Doe* d. *Wills* v. *Scott* (*i*); *Ledsome* v. *Hickman* (*k*); *Bretton* v. *Lethulier* (*l*); *Humphreys* v. *Howes* (*m*).

Secondly.

(*a*) 16 *Beav.* 46.
(*b*) *Moore*, 127, *pl.* 275.
(*c*) 17 *Beav.* 198.
(*d*) 1 *Colly.* 416.
(*e*) *Vol.* 1, *p.* 465 (*2nd edit.*)
(*f*) 1 *C. B. Rep.* 448.
(*g*) 4 *Term Rep.* 441.
(*h*) 1 *Ves. sen.* 420.
(*i*) 3 *Maule & S.* 300.
(*k*) 2 *Vern.* 611.
(*l*) *Ibid.* 653
(*m*) 1 *Russ. & Myl.* 639.

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Secondly. The residue of the real and personal estate, and the after-acquired real estate, are given to the children in the same proportions, and the widow takes no interest in the personal estate. By the codicil, the after-acquired real estate falls into the residue, subject to the widow's dower; the testator only intended her to take one-third, but if she first takes her dower, and then one-third of the remainder, she will have a much greater share than that which was intended by the testator.

Thirdly. The mortgage for 700*l.* on the *Ball Court* property is payable, primarily, out of the personal estate. Though the 17 & 18 *Vict.* c. 113, does not apply to wills made before the 1st of *January*, 1855, still the codicil, in this case, brings the will down to 1856, by force of the 1 *Vict.* c. 26, ss. 3, 4. The first act does not apply if the testator "has signified any contrary or other intention;" here he has done so by devising the residue, "after paying my mortgage and other debts." Again, the act only applies to mortgages, and not to rent-charges or annuities. The cases before this act required not only a charge on the real estate, but an exoneration of the personal estate.

Mr. *Bird*, for the widow and the other Defendants except the heir. The intention of the testator was, that if the prior interests were out of the way, those subsequent should take effect; *Hannam* v. *Sims* (*a*); *Jarman on Wills* (*b*).

Secondly. The widow is entitled for life to one-third of the real and personal estate. [Mr. *Jessel* admitted her right in regard to the real estate.] The real and personal

(*a*) 2 *De Gex & Jones*, 151. (*b*) *Vol.* 2, *p.* 667 (2*nd ed.*)

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personal estate are blended and given together in the same way, and if she takes one-third of the real estate, she must also take one-third of the personal.

Mr. *G. L. Russell*, for the heir at law. I admit that the word "or" must be read "and," but the effect will be to infuse into the whole disposition the invalidity of the gift over, in the event of making no disposition, and to make the whole gift over void. It is quite settled, that a gift over in default of the donee making a disposition, is inconsistent and repugnant, for the right to the property cannot be separated from the *jus disponendi*; *Ross* v. *Ross* (*a*); *Re Yalden* (*b*); *Grey* v. *Montague* (*c*); *Green* v. *Harvey* (*d*); *Cuthbert* v. *Purrier* (*e*); *Holmes* v. *Godson* (*f*), in which *Doe* d. *Stevenson* v. *Glover* (*g*) was doubted.

Mr. *Jessel*, in reply.

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March 16. The first question is, what estate the eight persons whose names are mentioned take in the lands devised to them, and it involves the question, whether the word "or" between the words "dying before having heirs of their body," and the words "making a particular disposition of his or her property," is to be read disjunctively or conjunctively. I think, upon the assumption that the word "or" must be read "and," that the estate taken by the devisees is an estate in fee, with an executory

(*a*) 1 *Jac. & W.* 154.
(*b*) 1 *De G., M. & G.* 53.
(*c*) 2 *Eden*, 205.
(*d*) 1 *Hare*, 428.
(*e*) *Jacob*, 415.
(*f*) 2 *Jur. N. S.* 383.
(*g*) 1 *C. B.* 448.

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executory devise over on the happening or not happening of a particular double event, viz. the failure of heirs of the body and of the making of a particular disposition by the devisee. If the latter branch of the alternative were omitted, it would be simply an estate tail in the devisee. It would be a devise to one and his heirs, with a devise over in the event of his dying without heirs of the body. But if the event on which the gift was to take effect is the double event, then the first estate cannot be treated as an estate tail, but it must be an estate in fee, with a gift over on the happening of the particular contingency, which consists of two events, viz. the "particular disposition" by the devisee and the failure of the heirs of his body; and I am of opinion, that I must so treat it.

The cases cited to me sufficiently establish, that the Court will convert the word "or" into "and" where the context requires it, although the effect may be, that the sentence so altered may contain a condition repugnant to the character of the estate given.

The Incorporated Society v. *Richards* (*a*) is an instance where this has been done. The words in that case were these:—"shall die without issue or make any will." In the present, the words are, shall "die before leaving an heir of the body or make a particular disposition." It is impossible to find two cases more nearly alike, and turning "or" into "and," I am of opinion that this condition is repugnant to the estate given, and that a gift over after an estate in fee on not making a particular disposition is wholly void. It is unnecessary to go through the cases on this part of the subject, because it is clear that where an estate is given to one in

(*a*) 1 *Drury & War.* 258.

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in fee, with a gift over in case he shall not dispose of the estate, the gift over is wholly void as repugnant, and it is so here, although it is coupled with another contingency, which, standing by itself, would be effective.

The question is, if this is an estate tail or an estate in fee in the first instance. If I read it disjunctively, I could not hold that an estate to a man and heirs, with a condition to go over, in either of these events, would make it an estate tail.

I also think that the question on this will is distinct from that class of cases where a testator gives property to *A.* and directs that, in case of his neglect or refusal to do an act within a definite period after the testator's decease, then to *B.*, in which case, if it happens that the prior devisee or legatee dies in the life of the testator, the gift over to *B.* takes effect. It is unnecessary to go through the minute distinctions which have prevailed in the cases on this subject, which have established and supported the doctrine of *Avelyn* v. *Ward* (*a*), and *Doe* d. *Wells* v. *Scott* (*b*), and are perfectly consistent with *Calthorpe* v. *Gough* (*c*), cited in *Doo* v. *Brabant* (*d*), and the other cases of *Williams* v. *Chitty* (*e*), and *Tarbuck* v. *Tarbuck* (*f*), before Lord *Cottenham*, which was a gift to a class and not to an individual, and is fully stated in *Jarman on Wills* (*g*).

These cases all go to shew, that in the present case, even if the gift over was unaffected by its being limited to take effect on an event inconsistent with the previous estate given, still that the gift over could not take effect, but

(*a*) 1 *Ves. sen.* 420.
(*b*) 3 *M. & Sel.* 300.
(*c*) 4 *Term Rep.* 707, *n.*
(*d*) 3 *Bro. C. C.* 393.
(*e*) 3 *Ves. jun.* 545.
(*f*) 4 *Law J.* (*N. S.*) *Ch.* 129.
(*g*) *Vol.* 2 (*2nd ed.*), 390.

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but that it would altogether have failed by reason of the death of the devisee in the lifetime of the testator.

The consequence of so holding is, that the shares devised to *Elizabeth* and *William Arthur* lapsed and fall into the residue, and they must be disposed of as part of such residue, inasmuch as the will, by means of the codicil, is brought under the operation of the late Wills Act. But this does not go on *toties quoties*, and the result of this lapse will be, that the share given to *Elizabeth* and *William Arthur*, when it forms part of the residue, will be undisposed of, and will go to the heir at law and next of kin respectively.

I am also of opinion, that the widow takes no interest in the personal estate. She takes an interest in the residuary real estate by the will, and her dower only in the after-acquired realty by the codicil. Mr. *Jessel* pointed out, that the widow takes one-third of after-acquired freeholds before they fall into the residue, and if she took one-third of the residue also, she would take five-ninths.

The last point is, whether the mortgage is to be paid out of the estate on which it is charged, or out of the general personal estate. It is not necessary to go into the question as to *Locke King's* Act, for there is a distinct direction in the will, that the debts shall be paid out of the residue. He gives the "residue of his real estate, after paying his mortgage and other debts," &c. The consequence is, that the residue must pay the mortgage and other debts, and the funeral expenses, and after that, there will be a division.

VICKERS v. HAND.

March 21.

The case of *De Tastet* v. *De Tastet*, 1 *Mac. & Gor.* 196, is overruled.

Where conditions of sale fix periods for the delivery of the abstract and the completion of the purchase, and provide that interest shall run, "if, from any cause whatever," the purchase should not be completed, the purchaser must pay interest from the time fixed, though the completion is delayed beyond the time specified, in consequence of the state of the title, if there be no fraud or wilful delay on the part of the vendor.

ON the 15th of *January*, 1838, the Plaintiff agreed to purchase an estate from the Defendant for 25,150*l*. The third condition of sale provided, that a deposit of 10*l*. per cent. should be paid, and it proceeded thus:—"And the remainder of the purchase-money shall be paid on the 24th day of *June* next, when the purchase shall be completed. And if, *from any cause whatever*, the payment and completion is delayed after the time above limited, the purchaser shall pay interest at 5*l*. per cent. on his purchase-money from thence until payment." By the fourth condition, the purchaser was to be entitled to the receipt of the rents and profits from the 25th day of *March* next.

The fifth condition was to this effect:—"The abstract of the title to the purchased premises, subject to the conditions hereinafter contained, shall be ready for delivery to the purchaser thereof, at the office of the vendor's solicitor, within one month after the day of sale." Objections were to be taken within one month after the delivery of the abstract, and that otherwise, the purchaser should waive the same.

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By conditions of sale, the abstract was to be delivered before the 18th of *February*, the purchaser was to take the rents from the 25th of *March*, and the purchase was to be completed on the 24th of *June*. And if, from any cause whatever, the completion should be delayed after that time, the purchaser was to pay interest at 5*l* per cent. Imperfect abstracts were delivered, and a complete abstract was not delivered until the 17th of *June*. Further delay having occurred in completing, the vendor deposited the purchase-money at a bankers', and gave notice, in *August*, that he would pay no interest. *Held*, that as there was no fraud or wilful delay on the part of the vendors, and as the delivery of an imperfect abstract arose simply from the state of the title, the purchaser must pay interest.

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An imperfect abstract was delivered on the 16th of *February*, and further abstract was delivered in *May*; but, as the Court held, a perfect abstract was not delivered until the 17th of *June*. In the meanwhile, on the 31st of *May*, the Plaintiff wrote to say that he should decline paying interest, as the delay was entirely through the default of the vendor, and that his money was producing nothing; and in *August* he deposited the purchase-money at two bankers, part at interest at 2*l.* per cent. and part producing no interest. The Plaintiff, on the 18th of *August*, gave notice to the Defendant of his having thus deposited the purchase-money, and that he claimed the rents from the 24th of *June*, without paying any interest except what the bankers allowed.

The difficulty in completing arose, principally and latterly entirely, from this circumstance:—the mortgagee, in whom the legal estate was vested, had died, having devised it to three trustees, one of whom had since died, and his heir at law was now in *India*; the other two had never acted, and they proposed disclaiming, and there was, therefore, a difficulty as to the persons to whom the mortgage-money ought to be paid.

This bill was filed on the 29th of *November*, 1858, for a specific performance, and the only question was, whether, under the conditions of sale, the Plaintiff was liable to pay interest on the purchase-money.

The Defendants, by their answer, stated that they were anxious to complete, "but that considerable difficulty and delay had arisen in respect of the said mortgage to *J. P. M.*, and with regard to the person to whom the mortgage debt should be paid. And they said, that they had made strenuous exertions to clear up such difficulties and to complete the purchase, and that

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that they were informed and believed, that such difficulties were now in course of being and would very shortly be cleared up."

Mr. *R. Palmer* and Mr. *R. R. A. Hawkins* for the Plaintiff.

Mr. *Martindale* for the Defendant.

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The only question in this case is, whether interest is to be paid on the purchase-money, under the terms of this contract. An abstract was to have been delivered in *February*, but the complete abstract was not, in fact, delivered until the 17th of *June*, or seven days only before the period from which interest was to run, and this was after express notice given by the purchaser that he would not pay interest, because he could not, in consequence of the state of the title, complete the purchase by that time, and this through no default of his.

In *De Visme* v. *De Visme* (*a*), Lord *Cottenham* held, that if the delay arises from the default of the vendor, the purchaser is not bound to pay interest, and that as the vendor had not performed his part of the contract, with regard to the delivery of the abstract, he could not insist on the purchaser performing his part with regard to the payment of interest, and that to hold otherwise, would be encouraging negligence and delay on the part of the vendor, who alone, being acquainted with his own title, was, as Lord *Cottenham* thought, bound to make such conditions only as he knew he could comply with.

In

(*a*) 1 *Mac. & G.* 336.

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In *Sherwin* v. *Shakespeare* (*a*), I followed this decision, which was binding on me as the decision of Lord *Cottenham*. On appeal (*b*), however, the Lords Justices dissented from Lord *Cottenham*, and reversed my decision; and the only question is, whether they have overruled *De Visme* v. *De Visme*, because if they have, I am bound to follow their decision.

What the Lord Justice *Knight Bruce* says is this (*c*): —"My conception of the rule applicable to a case of that description," &c. &c. . . . . "vendors here"— [His Honor read the judgment of Lord Justice *Knight Bruce* to p. 529.]

I am not sure whether the distinction is meant to be clearly drawn, (which is in my opinion essential in the consideration of the cases,) between the delivery of the abstract, and the making out of a good title. They are two perfectly distinct matters; the latter depends on the facts stated in the abstract being proved by sufficient evidence. The delivery of the abstract does not, I apprehend, mean the delivery of such an abstract as shews a title free from all cavil and objection, but one which abstracts all the documents necessary for the purpose of deducing a good title. The evidence by which it is supported is another and a separate and distinct matter.

Hence, as I read the judgment of the Lord Justice *Knight Bruce*, which is concurred in by the Lord Justice *Turner*, if the state of the title is such, that, without fraud or wilful delay, the abstract, which contains a statement of the deeds necessary to deduce the title, is not

(*a*) 18 *Beav.* 527.
(*b*) 5 *De G., M. & G.* 517.
(*c*) *Page* 527.

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not delivered within the time specified in the contract, this does not relieve the purchaser from his obligation of paying the interest specified in the contract from the time therein mentioned.

I think that decision governs the present case. I am sure that there is no fraud or wilful delay in this case, and that the delivery of an imperfect abstract arose singly from the state of the title; and consequently, I am of opinion, that the Plaintiff must pay interest at 5*l.* per cent. from the 26th of *June*, 1854. Although I must say, he could not possibly have completed the purchase by that time, he has, however, thought fit to enter into a contract of this description, and he must pay the interest accordingly.

March 25.
July 25.

PRINCE *v.* HINE.

Trustees applied a part of the capital of a fund belonging to infants, who had been left destitute by their father, for their benefit. They were allowed the amount.

THE testator gave the residue of his real and personal estate to *Hine and Johnson*, upon trust to sell and divide the produce between the children of his two brothers and his two sisters, in equal shares, *per capita*.

The testator died in *March*, 1852, and the four infant Plaintiffs were each entitled to a share of the residue. The executors set apart the share of the Plaintiffs, which, when invested, amounted to 1,538*l.* 3*s.* Consols. This bill, filed by the infants, by their mother as their next friend, complained that the trustees had sold out, and misapplied a part of the capital of the fund, viz. 200*l.* in *August*, 1854, and 100*l.* in *November*, 1855.

The Defendant *Hine*, by his answer, stated that the infant

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infant Plaintiffs and the mother lived with the testator, and were supported by him down to his death, and that they had no other means of support, and that their father, being a man of improvident habits, living separate and apart from his wife, had not contributed to the maintenance of his wife and children. That the Plaintiffs' father, in 1852, went to *Australia*, and had furnished no money for the support of his wife or children, and that his wife had heard and believed that he was dead.

He admitted the sale by him of the two sums of 200*l.* and 100*l.* Stock, and he stated that the produce had been paid to his co-trustee *Johnson*, with whom the Plaintiffs and their mother had resided after the testator's death, for the purpose of being applied for the maintenance &c. of the infant Plaintiffs.

He also stated as follows:—"I have every reason to believe that the income of the said trust funds and the capital sold out was duly applied for the maintenance, education and advancement of the infant Plaintiffs, for I received receipts from the said *Edward Johnson* from time to time, when he explained to me the expenditure thereof, and I knew that such income and capital advanced constituted the only fund which was applicable to the advancement and support of the said children, their mother not having any property, nor getting any income, and their father being absent from this country, and having left them destitute."

Mr. *Selwyn* and Mr. *Eddis*, for the Plaintiffs, sought to fix *Hine* with the two sums of 200*l.* and 100*l.* sold out by him.

Mr. *R. Palmer* and Mr. *Langworthy*, for *Hine*, asked to be allowed these sums which had been necessarily expended

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expended for the benefit of the infant Plaintiffs, or that an inquiry might be directed on the subject. They cited *Worthington* v. *M'Order* (a).

Mr. *Southgate* for *Johnson*.

The Master of the Rolls.

March 22.

In this case, I am of opinion, on looking into the authorities, that the Defendant is right, and that I must direct an inquiry, to ascertain whether any part of the capital of the fund which was sold out by *Hine*, viz., the sums of 200*l.* and 100*l.* has been applied for the maintenance of the infant Plaintiffs. I have before allowed to trustees capital *bonâ fide* expended for infants.

I shall, in the meantime, reserve the costs, and the inquiry must be at the request of the Defendant.

In answer to the inquiry thus directed, "whether the two several sums of 200*l.* Bank £3 per Cent. Annuities, and 100*l.* like annuities, had been properly applied for the benefit of the infant Plaintiffs," the chief clerk, on the 30th *June*, 1859, found that they had been properly applied for the infant Plaintiffs.

Whereupon, at the hearing on further consideration, on the 25th *July*, 1859, those sums were allowed.

(a) 23 *Beav.* 81.

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SPALDING *v.* THOMPSON.

March 23, 24, 27, 30.

A. B. effected a policy for securing a judgment debt due from him to *C. D.* *C. D.* afterwards obtained a second judgment against *A. B.* for a second debt. *A. B.* then conveyed real estate to trustees for sale, and to pay *A. B.*'s two judgments. After this, *C. D.* obtained a third judgment against *A. B.* *C. D.* subsequently recovered the amount of the policy, and, concealing that fact, he received the whole amount of the first two judgments from the trustees. *Held*, that he was entitled to retain all the moneys so received in payment of the three judgment debts, and could not be compelled, at the suit of *A. B.* or his representatives, to apply the policy money in satisfaction of the first judgment, and refund the difference between the sum paid by the trustees and the policy money.

ON the 18th of *March*, 1848, the late Lord *Suffield* executed a warrant of attorney to *Thompson*, for securing the payment to him of 500*l.* on the 21st of *June* following. About the same time, *Ker*, a sheriff's officer, effected an assurance on the life of Lord *Suffield* for 500*l.*

The policy was issued to *Ker*, on his asserting that he had an interest in the life of Lord *Suffield*, and which fact was recited in the policy, but *Ker* admitted that he had no lien upon it or any beneficial interest in it. As soon as the policy was issued, *Ker* handed it to *Thompson* with the following memorandum indorsed thereon:—

"In consideration of the sum of 500*l.* advanced to me for Lord *Suffield*, I hereby assign and convey all my interest in the within policy to *William Thompson*, of 31, *Chancery Lane*, in the county of *Middlesex*, gentleman, his executors, administrators or assigns.—*Thos. C. Ker.*—23rd day of *March*, 1848."

The Court came to the conclusion, that the policy was effected by *Ker* as the agent of Lord *Suffield*, and not, as *Thompson* alleged, for his benefit.

The 500*l.* not being paid, *Thompson*, on the 27th of *June*, 1848, entered up judgment against Lord *Suffield*. There

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There were other subsequent money transactions between Lord *Suffield* and *Thompson*, in respect of which *Thompson*, in *February*, 1849, obtained a second judgment against Lord *Suffield* for 555*l.*

On the 22nd of *June*, 1849, Lord *Suffield* conveyed certain estates to trustees, to secure payment to his judgment creditors, who thereby covenanted not to enforce their judgments against his estate. This deed was executed by *Thompson* in respect of his two judgment debts.

Afterwards, on the 26th of *June*, 1850, *Thompson* obtained a third judgment against Lord *Suffield* for 221*l.*

Lord *Suffield* died in *August*, 1853; and in *November* following the amount due on the policy was paid by the office to *Thompson*. *Ker* assisted him in obtaining payment, by making a statutory declaration that the policy was the property of *Thompson*, and *Ker* joined him in the receipt for the money.

In *January*, 1855, the trustees of the creditors' deed, not knowing that *Ker* had received the 500*l.*, paid him the full amount due on the first and second judgments. The Plaintiff, the executor of Lord *Suffield*, instituted this suit against *Thompson* and the trustees of the creditors' deed (who had refused to take any proceedings), insisting that the policy had been effected by *Ker* as the agent of Lord *Suffield*, and that the trustees had overpaid *Thompson* in respect of the two judgments, in ignorance of his receipt of the policy money. The bill prayed that *Thompson* might refund the 500*l.* and interest, *minus* the premiums.

Thompson, on the other hand, insisted that the policy

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was his own property, and not assigned to him as a security; but he offered to pay over the balance (154*l.*), after deducting the premiums (79*l.*) paid by him, and the expenses and the amount due on the third judgment of *June*, 1858 (255*l.*).

Mr. *R. Palmer* and Mr. *Jessel*, for the Plaintiff, argued, 1st. That the evidence established that the policy belonged to Lord *Suffield*.

2nd. That upon receipt by *Thompson* of the policy money, the first judgment debt, for which it was a security, had been discharged; that the subsequent payment of that amount by the trustees, in ignorance of the fact of such discharge, could not entitle the Defendant to retain the amount overpaid; and that the produce of the policy belonged to Lord *Suffield's* estate.

3rd. That the Defendant had no right of retainer or set-off in respect of the third judgment debt.

They cited *Lea* v. *Hinton* (*a*), *Moreland* v. *Isaac* (*b*), *Drysdale* v. *Piggott* (*c*), *Lake* v. *Brutton* (*d*).

Mr. *Selwyn* and Mr. *Busk*, for *Thompson*. The policy was *Thompson's*, though the first premium was paid by *Ker*, for the subsequent premiums were paid by *Thompson* and never charged against Lord *Suffield*, and *primâ facie*, a policy belongs to the person who pays the premium; *Triston* v. *Hardy* (*e*). The policy was intrinsically valueless, it might have been allowed to drop and a similar one effected in the name of *Thompson*

(*a*) 19 *Beav.* 324; 5 *De Gex, M. & G.* 823.
(*b*) 20 *Beav.* 389.
(*c*) 22 *Beav.* 238; 25 *L. J.* (*Ch.*) 878.
(*d*) 18 *Beav.* 34.
(*e*) 14 *Beav.* 232.

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Thompson on the same terms on the next day. The payments which were made by *Thompson* alone gave the policy any value, it was optional on him to keep it up, and he could have substantiated no claim on Lord *Suffield* for the premiums.

Secondly. The judgment was, under the 1 & 2 *Vict.* c. 110, s. 13, a charge on every interest of Lord *Suffield* in lands, and therefore on the produce of the trust estate; *Thompson* had a right to retain all his securities until all his debts had been satisfied. It is not a case of set-off, but of a creditor having two securities and two debts; and the debtor, if he comes to redeem, must pay both; *Rolfe* v. *Chester* (*a*); the money cannot be taken out of his hands until payment of all that is due to him.

Mr. *R. Palmer*, in reply. The policy money can only be applied in payment of the particular debt which it was given to secure, according to the contract between the parties. The third judgment could not be a lien on the policy, and set-off is out of the question; *Lambarde* v. *Older* (*b*). As to the doctrine of tacking, it only arises in cases of redemption. Here the Defendant over-stated the amount due to him, and has been overpaid; the difference ought to be repaid, either to the trustees or the legal personal representative of Lord *Suffield*.

The MASTER *of the* ROLLS.

The perusal of the evidence satisfies me, that the policy effected on the life of Lord *Suffield* was not the property

(*a*) 20 *Beav.* 610. (*b*) 17 *Beav.* 542.

perty of the Defendant, but that it was effected by *Ker* as the agent of Lord *Suffield*, and for the purpose of the transaction of the loan of 500*l.*

I concur, therefore, in the argument of the Plaintiff, that the facts and circumstances shew that it was not intended that the policy should be the property of the Defendant, but that it was effected by *Ker* as the agent and for the benefit of Lord *Suffield*. It was proper that he should make a declaration when it became payable, to enable the Defendant to receive the amount due on it.

On the other point, however, I cannot say that I regard this as a mere security for the 500*l.* I look at it in this light :—it was to be applied for that purpose in the first instance, and the balance only which would remain after the application of the produce of the policy could be demanded under the deed of the 22nd of *June*, 1849.

I regard it rather as the property or money of Lord *Suffield* come into the hands of *Thompson*, and as if it had been a policy effected on the life of a stranger, which had been assigned by Lord *Suffield* to *Thompson* to secure the advance made by him. If that had been so, I am of opinion, that Lord *Suffield* could not have enforced payment of the money without payment of the third judgment for 221*l.* obtained on the 26th of *June*, 1850, and in respect of which *Thompson* now asks to retain it.

If Lord *Suffield* himself could not in the case of a policy on the life of a stranger, I have to consider whether it makes any difference that the policy was on the life of Lord *Suffield*, and that the person now suing

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is his legal personal representative. I cannot see any distinction. It is equally the property of Lord *Suffield* or part of his estate, which came properly into the hands of the Defendant, and which neither Lord *Suffield* nor his executor is entitled to take away until the Defendant has been paid what is due to him.

This is my opinion, independently of the deed of the 22nd of *June*, 1849, but I do not think that the creditors' deed, securing the first and second judgments, and which was executed by Lord *Suffield* a year before the third judgment was obtained, alters the case.

The trustees applied to *Thompson* to ascertain what was due; he claimed the amount of the two judgments, and omitted all mention of the policy money which he had received, and he thus got his two judgments paid in full.

They were trustees of the surplus for Lord *Suffield*. The judgment debt was a charge on the surplus of the estate, which was the property of Lord *Suffield*. If the trustees had voluntarily paid the amount on the third judgment, could Lord *Suffield*, or his representatives, have insisted that the item was not to be allowed them in taking the account against them?

If the trustees had refused to pay *Thompson*, and he had filed a bill against them, a similar question would have arisen, as to whether he could be compelled to apply the policy money in discharge of the first judgment debt; but I doubt whether the trustees could have insisted on the attribution of the policy money in part discharge of the debt to be paid under the deed. But if they could, still, after the money had been paid to *Thompson*,

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Thompson, whether it were policy money or the excess of the money under the deed of *June*, 1849, and after it had been applied by him in discharge of the debt, it cannot be got back by any one. If the trustees were wrong, they may be liable to account for having exceeded their trusts in their dealings with the Plaintiff, but I doubt whether they were so.

On the whole, I see no means of taking the money out of *Thompson's* hands without paying his third judgment debt.

DECREE.

Order *Thompson* to repay 154*l.* to the Plaintiffs, with interest at 4*l.* per cent. from the 3rd of *January*, 1855.

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BROMLEY *v.* SMITH.

BOUSTEAD *v.* BROMLEY.

SMITH *v.* BROMLEY.

May 2. 3, 5, 9, 30.
June 4, 7.

THE first of the above suits was instituted by Sir *Henry Bromley*, Bart., against incumbrancers, to set aside certain charges in his reversionary interest created by him in favor of the Defendants in 1853 and 1855. The two other suits were instituted by the incumbrancers to enforce their securities.

The general rule is this:—Where a person deals with an expectant heir for his reversion, the burden of proof lies upon such person to prove the fairness of the transaction.

The application of the rule is not prevented, (i) by the fact that the transaction was a charge and not a sale; nor (ii) that the expectant heir was a person of mature age; nor (iii) that he perfectly understood the nature and extent of the transaction; nor (iv) is it necessary for the heir to shew that he was in pecuniary distress at the time.

The circumstances are stated in detail in the judgment of the Court, but the following is a short outline of the facts:—In 1853, Sir *Henry Bromley* was tenant for life in remainder of considerable estates, expectant on the death of his father Sir *Robert Howe Bromley*. The age of the Plaintiff was then thirty-eight, and of his father seventy-seven.

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An expectant heir mortgaged his reversionary estate, and, as a further security, he covenanted to keep up policies on his life, which, on his default, the mortgagees were empowered to do, and he covenanted to pay the amount and charged it on his reversion. On setting aside the transaction for inadequacy of consideration, the mortgagees were not allowed premiums paid by them under the security.

A Plaintiff was outlawed pending the suit. *Held*, that it was irregular to make the Attorney-General a party in respect of the outlawry, unless a question was raised with regard to its validity or enforcement.

A suit was instituted to set aside a charge on a reversion, and a cross suit to establish it. It being set aside for inadequacy of consideration merely, and a decree for redemption being made, the grantor was ordered to pay the costs of charges of fraud which had not been substantiated, but no costs were given as to the remainder of the first suit. The cross suit was dismissed with costs.

An expectant heir charged his reversion in 1853, and afterwards in 1855 to the same parties. The second transaction cancelled the first. The second being set aside by the Court: *Held*, that the first was not revived.

A dealing by an expectant heir being set aside: *Held*, that he must bear the costs paid for the securities.

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In 1853, the Plaintiff, being in want of money, raised it on the security of his reversion, in the following circuitous mode. He granted an annuity of 450*l.* during his life to Mr. *Smith* in consideration of 5,000*l.*, out of which sum he purchased from the *Albert Life Assurance Company*, for 1,765*l.*, an annuity of 450*l.*, payable for five years, if the Plaintiff and his father should so long live. Mr. *Smith's* annuity was secured on the Plaintiff's reversion, and also by an assignment of the *Albert* annuity, and by a judgment.

At the same time, a similar transaction took place between the Plaintiff and Sir *John Wilson.* The annuity being 360*l.*, granted in consideration of 4,000*l.*, out of which, 1,412*l.* were paid by him to the *Albert* for a similar annuity of 360*l.* *Mutatis mutandis*, the securities given were the same.

In 1855, the Plaintiff required a further advance, whereupon, in consideration of an annuity of 763*l.* during the Plaintiff's life, Mr. *Smith* advanced him 8,000*l.*, out of which 5,112*l.* 10*s.* was paid back for the repurchase of the first annuity of 450*l.*, and 1,372*l.* 10*s.* was paid to the *Albert Company* for the purchase of an additional annuity of 450*l.*, in continuation of that already granted in 1853, and to continue during the joint lives of the Plaintiff and his father. The second annuity granted by the Plaintiff was secured in a similar manner to the first.

At the same time (1855), Sir *John Wilson*, in consideration of an annuity of 858*l.*, payable during the Plaintiff's life, advanced the Plaintiff 9,000*l.*, out of which, 4,090*l.* was repaid to Sir *John* for the redemption of his first annuity, and 1,098*l.* was paid the *Albert* for an annuity of 360*l.*, from the expiration of the former, and to last during the joint lives of the Plaintiff

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Plaintiff and his father. Sir *John Wilson's* second annuity was secured as before.

This would have left 811*l.* of the two annuities to Mr. *Smith* and Sir *John Wilson* uncovered by the *Albert*; and to provide for the deficiency, that Company undertook to pay this portion of the annuities (811*l.*) in consideration of a sum of 151*l.* paid down and a charge of 10,000*l.* on the Plaintiff's reversionary estate, payable on the death of the Plaintiff or his father, and a policy on his own life.

The Plaintiff accordingly charged his reversionary estate with the payment to the *Albert* of 10,000*l.*, and he covenanted with them, from time to time, duly and regularly to pay the premiums and expenses respectively payable in order to keep on foot the policies of insurance (to the extent of 10,000*l.*) on the Plaintiff's life. And also, in case default should be made in keeping on foot the policies of insurance, it should be lawful for, but not obligatory upon, the mortgagees, from time to time, to keep on foot the said policies of insurance. And that the Plaintiff would pay unto the mortgagees such sum or sums of money as they should pay or expend in keeping on foot such insurances as aforesaid, with interest for the same, at the rate of 6*l.* per cent. per annum, from the respective times of paying or expending the same. And that the several powers, covenants, agreements and declarations thereinbefore contained for securing the principal sum of 10,000*l.*, and the interest thereof, should extend to the sums of money so to be paid by the said mortgagees in keeping on foot such insurances as aforesaid, and the interest thereof, and all costs occasioned by the non-payment thereof.

The 10,000*l.* was also secured by a judgment.

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Sir *Robert Howe Bromley* died on the 8th of *July*, 1857, and the Plaintiff then became entitled to the estates in possession for his life.

The Plaintiff, in *March*, 1858, instituted this suit against Mr. *Smith*, and against the executors of Sir *John Wilson* (deceased), the trustees of the *Albert*, and the manager and secretary, to set aside the securities of 1855 to Mr. *Smith*, Sir *John Wilson* and the *Albert*, upon re-payment of the sums advanced.

The Plaintiff, in substance, insisted, that the securities had been obtained from him, while under pecuniary pressure, that the consideration obtained by him for them was less than the fair market value, and that they ought to be set aside, as securities on a reversionary life estate of an expectant heir at an under value.

The bill contained charges of fraud and collusion, but from this the Court exonerated the Defendants. It appeared, however, that the parties were closely connected together in matters of business, and that these several matters substantially formed but one transaction.

The Plaintiff was outlawed by one of the Defendants pending the proceedings, and the Attorney-General was made a Defendant, upon an objection by one of the Defendants that he was a necessary party to the suit.

Mr. *R. Palmer* and Mr. *Renshawe* for the Plaintiff.

Sir *R. Bethell*, Mr. *Follett* and Mr. *J. J. Jervis* for the directors of the *Albert Assurance Office*.

Mr. *Lloyd* and Mr. *Schomberg* for Mr. *Smith*.

Mr.

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Mr. *Selwyn* and Mr. *W. Morris* for the executors of Sir *John Wilson*.

Mr. *Wickens* for the Attorney-General.

The following cases were cited: — *Chesterfield* v. *Janssen* (*a*); *Cole* v. *Gibbons* (*b*); *Gwynne* v. *Heaton* (*c*); *Lawley* v. *Hooper* (*d*); *Earl Portmore* v. *Taylor* (*e*); *Davis* v. *The Duke of Marlborough* (*f*); *King* v. *Hamlet* (*g*); *Newton* v. *Hunt* (*h*); *The Earl of Aldborough* v. *Trye* (*i*); *Salter* v. *Bradshaw* (*k*); *Price* v. *Berrington* (*l*).

The MASTER *of the* ROLLS.

May 30. There are, in this case, three suits, all of which depend on and arise out of the same facts, which constitute the transaction between the Plaintiff and the Defendants. One suit is instituted by Sir *Henry Bromley*, to set aside some deeds executed by him, by which he encumbered his reversionary life estate in a large property then in the possession of his father, Sir *Robert Bromley*, who has since departed this life. The two other suits are to enforce the securities then given. The decrees in these latter suits will be a matter of course, if Sir *Henry Bromley* fail in his attempt to impeach these securities. It becomes material, therefore, in the first instance, to consider whether Sir *Henry Bromley* is entitled to any relief. By his bill, he prays:—

(*a*) 2 *Ves. sen.* 125; 1 *Atk.* 301.
(*b*) 3 *P. Wms.* 290, 293.
(*c*) 1 *Bro. C. C.* 1.
(*d*) 3 *Atk.* 278.
(*e*) 4 *Sim.* 182.
(*f*) *Swan.* 108, 139, 154.
(*g*) 2 *Myl. & K.* 456; 3 *Cl. & Fin.* 218.
(*h*) 5 *Sim.* 511.
(*i*) 7 *Cl. & Fin.* 436.
(*k*) 26 *Beav.* 161.
(*l*) 3 *Mac. & Gor.* 486.

prays:—1. "That the several indentures of the 13th day of *April*, 1855, and the annuities of 763*l.* and 858*l.* thereby granted and secured as therein mentioned, and the indenture of mortgage of the 14th day of *April*, 1855, may be set aside. And (the Plaintiff being willing, and hereby offering, to pay to such persons or person, and in such manner as this Court shall direct, the amount of all sums actually advanced to the Plaintiff by or on behalf of the Defendant *Henry Porter Smith*, Sir *John Wilson* and the Defendants *Swynfen Jervis*, and *Henry Urmston Thomson*, and the said Sir *William Henry Dillon*, together with interest) that it may be declared, that the two several indentures of the 13th day of *April*, 1855, and the indenture of mortgage of the 14th day of *April*, 1855, ought to stand as a security only for such sums as were actually advanced to the Plaintiff, by or on behalf of the Defendant *Henry Porter Smith*, the said Sir *John Wilson*, and the Defendants *Swynfen Jervis*, and *Henry Urmston Thomson*, and the said Sir *William Henry Dillon*, together with such interest thereon as this Court shall direct."

It then asks that all the necessary accounts may be taken.

The indentures sought to be set aside are three, two of them bear date the 13th of *April*, 1855, and the third bears date the day following.

By the first deed, Sir *Henry Bromley* grants, during his life, an annuity of 763*l.* per annum to the Defendant *Henry Porter Smith*, redeemable on payment of 8,190*l.* 15*s.* By the second deed, Sir *Henry Bromley* grants, during his life, an annuity of 858*l.* *per annum* to Sir *John Wilson*, who is since deceased, and who is now

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now represented by the Defendants *Boustead* and *Anthony*, redeemable on payment of 9,214*l.* 10*s.*; and by the third deed, Sir *Henry Bromley* mortgages his reversionary life interest for the sum of 10,000*l.* and interest at 6*l.* per cent. *per annum*, to the *Albert Life Insurance Company*, which Company is represented in their different capacities of trustees, secretary and manager by the last five Defendants on the record, not including the Attorney-General, who is made a Defendant solely in respect of a judgment of outlawry now in force against the Plaintiff.

The transaction complained of, of which these three deeds form a part, took place in the month of *April*, 1855, but it is so connected with an earlier transaction in *December*, 1853, that it is necessary to go into the details of this earlier dealing between the same parties, both for the purpose of understanding the transaction itself, which is one of some complication, and also for the purpose of explaining the grounds and making clear the principle on which my decision rests.

The property in question charged by the deeds is a considerable estate in the counties of *Nottingham* and *Leicester*, the gross annual rental of which appears, as far as I can judge from the evidence, to have been, at the time of this transaction and to be now, something exceeding 8,000*l.* per annum, but from this is to be made considerable deductions, among them a jointure in favor of Lady *Bromley* of 1,650*l.* *per annum*, and various outgoings and other charges out of the estate, reducing the life estate of the Plaintiff, expectant on the decease of his father, to about 2,600*l.* *per annum*. The property had been originally settled at the time of the marriage of Sir *Robert Bromley* on himself for life, with remainder to his first and other sons in tail male. The

Plaintiff

Plaintiff was his eldest son, and therefore tenant in tail in remainder. By the effect of disentailing deeds and new appointments, the estate tail in reversion of the Plaintiff had, in *August* of the year 1851, been converted into an estate for life, with remainder to his first and other sons in tail male.

The dealings between the Plaintiff and the Defendants began in the month of *November*, 1853, and the first transaction between them was concluded in the month of *December* in that year. The first overture was made by the Plaintiff, in consequence of an advertisement appearing in the newspapers and some dealings which his brother had had with the same persons, which are not in question in this suit. The first application was made by the Plaintiff to Mr. *Allen*, at his office, 28A, *Regent Street*, and by him the Plaintiff was introduced to a Mr. *Rogers*, who carried on business as a solicitor in the same house.

The Plaintiff employed Mr. *Rogers* as his solicitor, to negociate the loan for him. Mr. *Rogers* had previously negociated loans for his clients with the *Albert Life Insurance Company*, and accordingly, on the present occasion, Mr. *Rogers*, acting as the Plaintiff's solicitor and on his behalf, applied to the Defendant *George Goldsmith Kirby*, who was and is the manager of the *Albert Life Insurance Company*, carrying on business at No. 11, *Waterloo Place, Pall Mall*, to ascertain if a loan of money could be procured for the Plaintiff upon the security of his reversionary estate. Upon receiving this overture, Mr. *Kirby* communicated the Plaintiff's desire to Mr. *Smith* the Defendant, and to Sir *John Wilson*, who I have stated is since deceased, and put them in communication with Mr. *Rogers*, the solicitor acting for the Plaintiff in this matter. The Defendants

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ascertained from Messrs. *Sweeting & Byrne*, who were the family solicitors of the Plaintiff, the nature and extent of the Plaintiff's interest, and the value of the estate, and entered into negociations with him accordingly; when I say, the Defendants ascertained the nature and extent of the Plaintiff's interest, I mean that they did so by themselves or their agents. Sir *John Wilson*, who appears to have been a retired *East Indian* officer, probably, personally knew nothing of the whole matter, or any of the details of it, except that he was advancing money on what he considered to be a good security for a higher rate of interest than could be obtained in ordinary money transactions. After some negociation, the following arrangement was carried into effect, by the execution of four deeds, two of which bore date on the 3rd of *November*, and the remaining two on the 8th *December*, 1853. By one deed, the Plaintiff, in consideration of 5,000*l.*, granted to *Henry Porter Smith* a present annuity of 450*l.*, to continue for the life of the Plaintiff, but to be redeemable at any time without previous notice on payment of 5,112*l.* 10*s.*, that is, on payment of the amount advanced, together with one quarter's payment of the annuity, which addition was made to compensate for the absence of notice.

I purposely omit, in order to avoid confusion in the consideration of this part of the case, the question whether the reversionary interest of the Plaintiff was supposed to be an estate in tail male or for life. I shall deal with that question separately.

The annuity was secured by the deed on the reversionary estate of the Plaintiff, whatever that estate was. The annuity was calculated on such a rate as would pay 6*l.* per cent. interest on the money advanced, and also the premiums of insurance on the life of the Plaintiff, that

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is to say, 300*l.* per annum for the interest at 6*l.* per cent. on 5,000*l.*, and 150*l.* per annum for the premiums required to insure the life of the Plaintiff, then of the age of thirty-seven years, for the sum of 5,000*l.*

The advance by Sir *John Wilson* was regulated and conducted in exactly the same manner. By the second deed, in consideration of the sum of 4,000*l.*, the Plaintiff granted an annuity of 360*l.* *per annum* to Sir *John Wilson*, for the life of the Plaintiff, secured in like manner on his reversionary interest in the family estates.

But the matter did not and indeed could not, rest there. This was sufficiently obvious:—that if nothing more was done, during the life of Sir *Robert Bromley*, at least, the Plaintiff would have no means of paying the annuity as it accrued due, nor would the annuitants have any means of enforcing or obtaining payment of it. In order to obviate this difficulty, the following expedient was resorted to:—The Plaintiff purchased from the *Albert Life Assurance Company* an annuity of 450*l.* to last for five years if Sir *Robert* and the Plaintiff should both so long live, at the price of 1,765*l.*, and he bought another annuity of 360*l.*, to last the same time, at the price of 1,412*l.* It was settled that *Smith* should receive from the office the annuity of 450*l.* so long as it endured, and Sir *John Wilson* should receive the annuity of 360*l.* in like manner. The whole transaction was concluded on the 8th of *December*, 1853, and 4,000*l.* was then paid to the Plaintiff on behalf of Mr. *Smith* (1,000*l.* having been previously by anticipation paid to him), thus making up the 5,000*l.* which was paid to him in Bank of *England* notes. Out of this money, the Plaintiff paid 1,765*l.* to the *Albert Life Assurance Company* for the annuity granted by them. At the same time, 4,000*l.* was paid to the Plaintiff on behalf

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of Sir *John Wilson*, out of which the Plaintiff paid 1,412*l.* to the *Albert Life Assurance* for the second annuity of 800*l.* granted by them. After deducting those two sums, amounting together to 3,175*l.*, the balance of 5,823*l.*, remaining in the hands of the Plaintiff, was further reduced by payment of the costs of the transaction. What those amounted to does not appear, however the Plaintiff swears he only received, for his own use and benefit, 5,000*l.* out of the transaction, and if this be correct, the balance of 823*l.* must be attributed to costs or incidental expenses, but the amount of those are not now in question. and the payment of the whole sum of 5,000*l.* to the Plaintiff is, as I have said, proved, though it was at the time and as part of the same transaction reduced by the payments I have already stated.

This is the first dealing between the Plaintiff and the Defendants. It is impugned by the bill, it is defended by the Defendants, and they bring forward a large amount of testimony to establish that the sums so advanced were the regular and admitted market price of purchasing and granting such annuities. This transaction, however, is not now subsisting; it has been wholly superseded by and merged in the subsequent transactions which occurred in the month of *April*, 1855. It is only necessary to understand it, because the mode of putting an end to it formed one of the elements in the new dealing which took place between the Plaintiff and Defendants.

The ages of the Plaintiff and his father and mother are material for the due appreciation of both transactions. In *December*, 1854, Sir *Robert Bromley* was seventy-five years old, Lady *Bromley* was sixty-six years, and the Plaintiff was thirty-seven, having been born on *Christmas Day*, 1816. In *April*, 1855, Sir *Robert Bromley* was

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was in his seventy-seventh year, and the Plaintiff was thirty-eight years and four months old, the time which elapsed between the first and second transactions being sixteen months, within a few days.

The Plaintiff, as is usual in such cases, found that the money he had borrowed lasted him but a very short time, and accordingly, in *March*, 1855, he applied to the same persons for a further advance. The new transaction was professedly arranged on the same terms, that is to say, upon the principle of obtaining 6*l.* per cent. annual interest for the advances, and paying the premiums necessary to insure the life of the Plaintiff. But it was deemed advisable, that it should be, as it were, a new transaction beginning from that time, and consequently, that the former transaction should be closed, and for this purpose, it was necessary, in the first place, that the Plaintiff should redeem the first annuities, and that he should grant fresh ones for the amount of the loans required by him. In the next place, the Defendants *Smith* and Sir *John Wilson* began to be apprehensive that Sir *Robert Bromley's* life might be prolonged beyond *December*, 1858, and therefore, instead of limiting the security to be obtained from the *Albert Insurance Company* to annuities granted for five years, upon the calculation that those would exceed the period of the joint lives of the Plaintiff and his father, it was settled, that the annuities to be granted by the *Albert Insurance Company* should be so modified as to make them last for the joint lives of Sir *Robert Bromley* and the Plaintiff, however long that period might last.

Accordingly, what took place was this:—*Smith* advanced to the Plaintiff 8,000*l.*, as the purchase-money for an immediate annuity of 763*l.* for the life of the

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Plaintiff secured on the reversionary interest of the Plaintiff in the family estates. Out of that 8,000*l.*, the Plaintiff paid back to Mr. *Smith* 5,112*l.* 10*s.*, which was the price for the redemption of the annuity of 450*l.* fixed by the deed of *December*, 1853. This left a balance of 2,887*l.* 10*s.* in the Plaintiff's hands, but out of this he paid a further sum of 1,372*l.* 10*s.* to the *Albert Office*, as the price of an annuity of 450*l.*, to commence at the end of the annuity of 450*l.* already granted by the *Albert Office* in *December*, 1853, and which, in any event, was determinable at the expiration of five years, and which annuity was to continue for the joint lives of Sir *Robert Bromley* and the Plaintiff, however remote that period might be. By this means, therefore, in any event, the payment of 450*l.*, part of the annuity of 763*l.* granted to the Plaintiff, was provided for until the reversionary interest of the Plaintiff became vested in possession, but it left the present payment of 313*l.*, the remainder of that annuity of 763*l.*, unprovided for during the joint lives of the Plaintiff and his father. In like manner, Sir *John Wilson* paid to the Plaintiff 9,000*l.*, as the purchase-money for an immediate annuity of 360*l.* granted for the life of the Plaintiff to Sir *John Wilson*, secured on the reversionary interest of the Plaintiff in the family estates. Out of this 9,000*l.*, the Plaintiff repaid to Sir *John Wilson* the sum of 4,090*l.*, being the redemption money fixed for the re-purchase of the annuity of 360*l.* by the deed of *December*, 1853. This left in the Plaintiff's hands a balance of 4,910*l.*, but this balance was further reduced by a payment of 1,098*l.*, which was paid to the *Albert Insurance Office*, as the consideration for the grant of an annuity of 360*l.*, to commence at the expiration of the annuity of 360*l.* already granted by the *Albert Insurance Company* in *December*, 1853, and which, at the latest, ceased in the month of *December*, 1858.

1858. This new annuity was to continue till the death of either Sir *Robert Bromley* or the Plaintiff, however remote that might be. This, therefore, as in the analogous instance of *Henry Porter Smith*, provided for the payment of 360*l.*, part of the annuity of 858*l.*, now granted to Sir *John Wilson*, until the reversionary interest in the family estates in tail vested in possession. But it left the payment of 478*l.*, the remainder of this annuity of 858*l.*, unprovided for during the joint lives of the Plaintiff and his father.

The annual payment, during the joint lives of the Plaintiff and his father, of the two sums of 313*l.* and 498*l.*, amounting altogether to 811*l.*, had therefore still to be provided for. This object could not be accomplished by the present purchase of an annuity from the *Albert Life Office*, for the balance of the two sums of money paid by the Plaintiff, and remaining in his hands, were not sufficient for this purpose, and at the same time to leave anything substantial for the Plaintiff to receive; for out of the 8,000*l.* paid to him by the Defendant *Smith*, the Plaintiff had already but 1,515*l.* remaining, and out of the 9,000*l.* paid to him by Sir *John Wilson* he had but the balance of 3,812*l.*

If, therefore, the *Albert Company* were to grant a present annuity of 811*l.* during the joint lives of the Plaintiff and his father, that would only be accomplished by securing to the *Albert Company* the price of that annuity by a mortgage on the reversionary interest of the Plaintiff. Accordingly, this part of the arrangement was accomplished in the following manner:— The *Albert Company* undertook to pay for this unprovided portion of the two annuities, amounting together to the sum of 811*l.*, in consideration of receiving a sum of 151*l.* paid down, and a further sum of 10,000*l.*, to be

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secured by a judgment and by a mortgage on the reversionary interest of the Plaintiff in the family estates. This sum was ascertained in the following manner:—The annuities they would have to pay were 811*l.*; the sum necessary to insure the life of the Plaintiff, to secure the sum of 10,000*l.* would be 280*l.* 16*s.* 8*d.*, the interest on 10,000*l.* at 6*l.* per cent. would be 600*l.*, and those sums altogether amounting to 1,691*l.* 16*s.* 8*d.* Besides those, the sums to be paid to Mr. *Smith* and Sir *J. Wilson*, who had other claims, amounted to *per annum* 810*l.*, making 2,501*l.* 16*s.* 8*d.* to be annually allowed to them in respect of the payments they had to make, and which would balance those payments.

The payments, therefore, which they had to make in the first instance, were for premiums of insurance and interest on the 10,000*l.*, 880*l.* 16*s.* 8*d.*; and secondly, the annuities to Mr. *Smith* and Sir *John Wilson*, amounting to the sum of 1,621*l.*, making the same sum total of 2,501*l.* 16*s.* 8*d.*

The account is thus stated by the *Albert Assurance Company* in their answer:—"And I further say, that the Plaintiff also signed an account between himself and the said *Albert Assurance Company*, being the account which in the said indenture of mortgage of the 14th day of *April*, 1855, is recited to have been settled and signed on the day of the date of such indenture, which was in the words and figures following, that is to say:"—

Henry Bromley, Esq., in account with *Swynfen Jervis* Esq., Dr. *Henry Urmston Thomson* and Sir *William Henry Dillon* (being the account referred to in a certain deed of mortgage, dated the 14th day of *April*, 1855, to which the aforesaid are parties).

1855, *April* 14th.—To amount of the conside-

ration

	£	s.
ration for annuity of 1,691*l.* 16*s.* 8*d.* granted by the *Albert Life Assurance Company*, and payable during the joint lives of the said *Henry Bromley* and his father Sir *Robert Hone Bromley*, Bart.	10,151	0
To stamp for the grant	51	0
To amounts of the consideration for annuities of 450*l.* and 360*l.* granted by the said *Albert Life Assurance Company*, and payable during the remainder of the joint existence of the said *Henry Bromley* and Sir *Robert Howe Bromley* after the expiration of the term of annuities of 450*l.* and 360*l.* granted by the said company to the said *Henry Bromley* on the 8th day of *December*, 1853 . . .	2,470	10
To stamps for the grants	12	10
	£12,685	0

That explains how the 12,685*l.* is made up.

That is the debtor account,—the creditor account is this:—

April 14th.

By amount secured by the mortgage deed above mentioned	£ 10,000	s. 0
By cash received of Mr. *Henry Bromley* .	2,685	0
	£12,685	0

That, although stated in a different form, is exactly, in its results, the same transaction as that which I have stated to have taken place.

Evidence is brought forward, to which I will presently refer, with a view to shew that the sums paid and the annuities granted were the fair, regular and market price for each part of this transaction. Assuming this to be the case, it cannot be denied, that if

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if it is to be regarded as a whole, it pressed heavily on the Plaintiff. To him the result of it was, that he got 5,176*l.* in cash, that he granted annuities for 811*l.*, and that his estate was charged with 18,202*l.* debt, and in this result I omit the consideration of costs and expenses, which necessarily must have been very heavy in such a complicated transaction, involving the preparation and execution of so many deeds. The Plaintiff swears he only put into his pocket, out of these transactions, the net sum of 8,695*l.* According to the Defendants' shewing, he obtained on both these transactions the sum of 11,000*l.*, subject to the necessary deductions for costs and expenses. According to the Plaintiff's statement, after deducting costs, he only obtained 8,695*l.* One thing is clear, that if the former transaction had been allowed to remain unaltered, and the parties had proceeded to negotiate a fresh loan, in the same manner as if they had been strangers to the first transaction, and upon the same footing, which might have been done, assuming that the Plaintiff's share in the net rental of the settled estates would have amounted to 2,500*l.* per annum, he would have saved, in the first place, 2,002*l.* 10*s.* paid for the redemption of the two first annuities, and he would, in the second place, have saved the 2,470*l.* 10*s.* paid for converting the annuities for the joint lives of himself and his father, determinable at the expiration of five years, into annuities for the joint lives of his father and himself, if that event occurred subsequently to *December*, 1858. It is also clear, that, as Sir *Robert* was about one year older in 1855, the second transaction, if varied at all in this respect, ought to have been in a direction more favorable to the Plaintiff. If the second loan had been negotiated upon the same terms, in all respects, as the former one, the Plaintiff, according to the statement on both sides, would have obtained a large

a large amount of money to meet his wants, and he would have saved at least 9,000*l.* in the amount of the additional charge to be thrown on his reversionary life estate.

The question is, whether this transaction can be impeached in this Court, having regard to the circumstances established by the evidence to which I am about to refer? In the first place, on behalf of the Defendants, it is, in my opinion, established by the evidence, that Mr. *Rogers* acted as the solicitor of the Plaintiff throughout, and not as solicitor of any other person. That he was well acquainted with the Defendants who transacted the matter, and that he had had dealings with them before is clear, but this is always or generally the case in such matters as these, and is not, in my opinion, very material.

In the second place, it is also, in my opinion, clearly established, that the Plaintiff knew perfectly well what he was doing throughout, and that the whole matter was clearly explained to him in untechnical language. The paper written and signed by him is conclusive evidence of this fact. He was, moreover, a gentleman of mature years, in the vigour of his life and intellect, and at that period of life when, if ever, he must have been most competent to understand such matters. He had also, as appears from what I have already stated, experience of such transactions, both on his own account and those of his brother. It was with this knowledge, and surrounded with these circumstances, that the Plaintiff entered into the transaction of *April*, 1855, which I have described, as it is established by the facts proved or admitted in the case.

It is now necessary to consider the principles of law applicable

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applicable to this case. The general rule is this:—When a person deals with an expectant heir for his reversion, and the dealing is disputed, the burthen of proof lies upon the person so dealing to prove the fairness of the transaction. Is there anything in this case to prevent the application of that rule? That Courts of Equity look with peculiar favor on expectant heirs dealing for their expectancies is not to be disputed. But in the first instance, a distinction is taken, on behalf of the Defendants, that this Court does not look at a *charge* upon the reversion in the same light as it does the *sale* of the reversion, and though the words of the reported cases are — "an expectant heir dealing for his expectancy and reversion," those words, it is contended, are confined to cases of sale, and do not extend to cases of charge or money borrowed upon the security of the reversion. I am unable, however, to discover anything that warrants such a distinction. On principle, it clearly cannot be supported, for a mortgage or a charge is always considered in this Court as a sale *pro tanto*, and it would be a very easy but a very transparent device, in any case when a sale was really intended, to call it a charge, and make the conditions of redemption such as to render it clear that the redemption would be impossible, and that the charge must exhaust the whole value of the interest of the borrower when it becomes vested in possession. If it cannot be founded on principle, as little can it be rested on reported decisions. I cannot find that any such distinction has ever been countenanced by anything to be found in the books. The case of *Davis* v. *The Duke of Marlborough* (*a*), is certainly all but an express decision the other way, and the observations of Lord *Eldon*, frequently referred to in the course of the argument, which are to be found in page 154 of that report, expressly lay

(*a*) 2 *Swanst.* 108.

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lay down, that a grant, by an expectant heir, of a present annuity charged upon an estate in expectation is a dealing within the meaning of the rule, and that such an heir is entitled to the protection given by the Court of Equity to an heir apparent dealing for his expectation.

It was argued, that if the raising of money in this way be not permitted to be accomplished directly, it will be so indirectly; that nothing can prevent an expectant heir from permitting, either by confession or warrant of attorney or adversely, a judgment to be entered up against him; that the judgment, so entered up, will bind the reversion, and will become a charge upon it, and that in this mode, at least, the reversion may be sold. I think however the cases are distinguishable; the case of an adverse judgment is not a direct dealing by the expectant heir with his reversion, and if it were, the reversion would be sold by auction, which it is admitted may be done, and by this means the heir obtains a tolerably certain proof that he has obtained for his reversion as much as it is worth; but if not sold by auction and the judgment were only part of the transaction, it would not affect the view which the Court would take of the case. I am, therefore, of opinion, that the fact, that this is a charge and not a sale, does not affect the case, and that though it is a charge effected upon a reversion, this does not prevent the application of the rule.

The next question is, does the fact that the expectant heir is a person of mature age prevent the application of the rule? This also appears to me to be settled in the negative by the decided cases. In the case of *The Earl Portmore* v. *Taylor* (*a*), the expectant heir was thirty-six

(*a*) 4 *Sim.* 182.

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thirty-six years of age, and in none of the cases does the age of the expectant heir appear to have been regarded as a matter of importance. Lord *Eldon*, in *Davis* v. *The Duke of Marlborough* (*a*) says, "according to the decisions of this Court, I do not think that years make much difference in the protection afforded to an expectant heir." I think, therefore, the fact, that in case before me the Plaintiff was in his thirty-ninth year in *April*, 1855, does not debar him from asking relief in Court.

The next question is, does the fact, that the expectant heir was well acquainted with and fully understood the whole nature of the transaction, prevent the application of the rule? Here again, upon a reference to the decided cases, no such distinction is found to prevail. Lord *Eldon*, in the case already referred to, expressly declares the non-application of it, for although he admits his feeling to be, that, in many cases, those who seek relief from these annuities have really taken as much advantage of the annuitants as those annuitants have taken of them, still he says, that the expectant heir is entitled to the benefit of the principle, and casts the burthen on the annuitant to shew that the bargain was reasonable.

Neither is it necessary for the heir to shew that he was in distress for money at the time; that fact is assumed, from the circumstance of his having dealt with any one upon such a footing, and the assumption, that the person advancing the money has possibly taken advantage of that distress, is the reason why the Court throws upon him the burthen of proving that the bargain he executed was reasonable.

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(*a*) 2 *Swanst.* 143.

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It was argued, with much force, that the doctrine of the Court, in such matters, is in truth an injury to the persons intended to be protected, and that to prevent any person, however great may be his necessity, from raising any money upon the reversion of his estate, unless at the peril of having the whole transaction ripped up in the Court of Chancery, and being put to the proof of establishing the fairness and reasonableness of the terms upon which it was conducted, only produces this effect:—That it adds to the transaction the additional element of uncertainty, which must be paid for by the borrower, and therefore increases the exorbitancy of the terms required from the heir, in order to pay the lender for the liability he incurs of the bargain being afterwards contested. It is not my province, in this place, nor am I disposed, to express any dissent from or assent to the argument thus adduced. The province of the Judge sitting in the Court is, to administer and not to reform the Law, and so long as the legislature thinks fit to leave the law in its present state, this Court must apply the principles it finds established, and must administer relief to expectant heirs, who, after they have come into possession of their property, complain of the unconscionable bargains which they have previously, from necessity, been compelled to enter into, with persons who would advance their money to them upon no other terms.

Having then arrived at the conclusion that the three following matters, viz., first, that the transaction was a charge and not a sale, secondly, that the Plaintiff was a man of mature age, and thirdly, that he perfectly understood the nature and extent of the transaction, do not, whether taken separately or conjointly, disentitle the Plaintiff to relief, the only matter that remains to be considered is, whether the Defendants have discharged the

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the burthen which, as I have stated, the rule of the Court throws upon them, viz., that of proving that the bargain of 1855 was a fair and reasonable bargain? In my opinion, they have failed in accomplishing their task.

In the first place, I examine the transaction by taking each case separately, and then by taking the whole conjointly. In taking each case separately, the following results appear:—First, as to the *Albert Assurance Company*, I have no evidence before me to shew that the sum of 10,000*l.* charged on the reversion, together with the sum of 151*l.* paid down, was a fair and proper price for the annuity of 811*l.* per annum; and what is more, I have evidence of the Defendants before me, which, by analogy and inference from their statement of what is fair, leads me to the conclusion, that even without the payment of 151*l.*, the charge of 10,000*l.* was too large a price to be paid for that annuity.

Secondly. As to Mr. *Smith*, it is obvious that by blending the old annuity into a fresh annuity, instead of purchasing an additional annuity, he obtained 112*l.* or one quarter's annuity from the Plaintiff, which he could not otherwise have obtained.

Thirdly. The same observation applies to Sir *John Wilson*, although the amount, in his case, is smaller, viz. the sum of 90*l.*

These facts prove, that a sum was given in this case larger than what ought to have been given, although, having regard to the magnitude of the transaction, the excess is not considerable. In my opinion, the transaction cannot properly be regarded as three separate transactions,

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transactions, but really was, and ought to be regarded as one combined operation, in which both the *Albert Life Assurance Company*, Mr. *Smith* and Sir *John Wilson* were jointly, for their different interests, concerned. I not only give the Defendants full credit for their denial of any collusion or concert, but I am convinced that nothing of that sort existed between them, in any improper sense of the word. Of this, I am equally convinced, that Mr. *Smith's* bargain with the Plaintiff could not have been effected, except through the instrumentality of the *Albert Insurance Company*, or of some other Insurance Company, which would have acted a similar part; and also, that, in like manner, Sir *John Wilson's* advances to the Plaintiff, and the security of his annuity, could only have been effected through the *Albert Life Assurance Company*, or some person or company who would have performed the part sustained by them in this matter.

It is, in fact, one transaction in every proper sense of the term. The parties to it act quite openly, they say to the Plaintiff, "we will not deal with you upon any other terms than these;" the Plaintiff understands this, he learns what those terms are, and he agrees to them, but the real fact is, that the whole matter is one transaction, by which the Plaintiff is to obtain as much money as he can upon the security of his reversionary life estate, and into that transaction four parties enter; first, the Plaintiff, who borrows the money; secondly and thirdly, *Henry Porter Smith* and Sir *John Wilson*, who between them advance the money; and fourthly, the *Albert Life Assurance Company*, who in consideration of receiving a part of that money and the mortgage of the Plaintiff's reversion, secure to Mr. *Smith* and Sir *John Wilson* the due payment of the annuities granted to them by the Plaintiff.

So

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So regarding the matter, the Defendants themselves have supplied me with a test by which to appreciate the character and to decide upon the fairness and reasonableness of the bargain of *April*, 1855, and that test is, the previous bargain of *December*, 1853. The situation of the Plaintiff was more favorable to him, in *April*, 1855, for the purpose of raising money, than it was in *December*, 1853; he ought, therefore, to have been able to raise the money upon terms not less favorable than those on which he obtained it before; the income of the estate being, as it was proved to have been, sufficient to pay the full amount of these annual charges which would fall upon it when he came into possession. In *December*, 1853, the Plaintiff obtained between 5,000*l.* and 6,000*l.*, by granting two annuities, amounting together to 810*l.* In *April*, 1855, he obtained from 600*l.* to 700*l.* less, upon granting two annuities amounting together to 811*l.*, and giving a mortgage upon his reversionary estate for 10,000*l.* Another mode of stating the case, is this:—In *December*, 1853, the Plaintiff obtained 5,825*l.* as the price for granting a present annuity of 810*l.* redeemable on payment of 9,202*l.* In *April*, 1855, having redeemed the former annuities, he obtains 11,000*l.*, as the price for granting a present annuity of 1,621*l.*, redeemable on payment of 18,202*l.* and a mortgage of 10,000*l.*; this result is arrived at by adopting the Defendants' figures, and without taking into account the expenses, all of which fell upon the Plaintiff, and which appear to have been very heavy.

When the transaction is dissected and the details are examined, the pressure upon the Plaintiff becomes still more apparent. No reason is suggested why the transaction of *December*, 1853, was annulled, and a wholly new one set on foot, beyond this:—which exists in all these

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these cases, namely, that the Defendants would only deal upon that footing, and yet, the immediate effect of annulling the old transaction and merging it into the new one was, in the first place, that in order to effect it the Plaintiff had to pay 202*l.* to Mr. *Smith* and Sir *John Wilson*, purely gratuitously, and for which he got nothing in the shape of an equivalent; and in the second place, he had to pay 2,470*l.* to the *Albert Insurance Company* in order to eliminate from the annuity of 810*l.* granted by that company upon the terms that it was to cease, either at the end of five years or at the termination of the joint lives of Plaintiff and his father, whichever event should first happen, the first term, namely, that it was to be determined at the end of five years. In any event, this 2,470*l.* paid to the *Albert Insurance Company* was a pure loss to the Plaintiff, for which he received nothing in the shape of equivalent. It is true, that if Sir *Robert* had survived the five years, it would have been necessary to provide for the payment of the annuity during his life, but even, if he had survived at the end of five years, it would have been possible to have accomplished this upon much easier terms than by the payment of such a sum of money. If the first transaction was a fair bargain, as the Defendants' witnesses say it was, and if it was no more than a fair bargain, and more than this cannot be assumed in favor of the Defendants, then the second must be considered to have pressed unfairly on the Plaintiff. The Defendants, I repeat, supply me with a test, by which to measure the character of the second transaction, and that test produces a result unfavorable to them. In truth, it appears to me, as I stated it to Sir *Richard Bethell* in the course of his argument, as if the Defendants had taken advantage of the second application for money by the Plaintiff to convert the first transaction into one more favorable for each of the

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three parties concerned in the advance than it originally was, and that they did this by the means of annulling it and merging it in the second arrangement.

It appears from this, that, in my opinion, the Plaintiff is entitled to a decree upon the facts proved, unless he has disentitled himself to it by the form of his pleadings. The objection urged by the Defendants upon the form of the pleadings is this:—It is shewn that the Plaintiff has, in many paragraphs of his bill, alleged that the Defendants acted in concert and collusion with each other, and entered into a conspiracy to injure him and benefit themselves; that he has advanced these assertions with unscrupulous freedom and recklessness, and that this case is wholly disproved. The rule of this Court, and a rule very properly and strictly enforced, in order to prevent Plaintiffs from wilfully bringing forward such grave charges, is, that when such grave charges are made and not proved, the bill must be dismissed with costs. I do not dispute the rule or the propriety of it. I consider, however, that it is properly limited to the extent pointed out by Lord *Cottenham*, in the case of *Archbold* v. *The Charity Commissioners of Ireland* (*a*). Those observations, in my opinion, strictly apply to this case. The relief to which the Plaintiff is, in my opinion, entitled is not founded on any fraud or conspiracy on the part of the Defendants, but is founded on the fact that they were all parties to a bargain of a very complicated character, entered into with the Plaintiff dealing with them for his expectancy, which they have failed to prove was a fair and reasonable bargain. It is true, that the passages pointed out to me in 16th, 17th, 18th, 58th, 61st and 63rd paragraphs of the bill are, or at least many of them are, contrary to the proved facts of the case, but

(*a*) 2 *H. of L. Cas.* 460.

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but it must be admitted, in extenuation of such statements, that the Court has, on the consideration of the evidence and on the facts proved, come to the conclusion, that the Defendants Mr. *Smith*, Sir *John Wilson* and the *Albert Life Assurance Company* were all parties to a transaction by which money was advanced upon unfair terms. It is true, that Sir *John Wilson*, as I have already stated, knew nothing about it. It is also true, that the directors of the *Albert Life Assurance Company*, who are Defendants, were personally wholly ignorant of the whole matter, but as directors, and in what I may call their *quasi* corporate character, they are responsible for the acts of Mr. *Kirby* their manager. He wanted to make a good bargain for the company, but he forgot that this Court might require him to prove that it was a reasonable bargain for the Plaintiff to enter into.

It is with respect to this part of the case, namely, the allegations of collusion and conspiracy, and which are equivalent to fraud, though the word "*fraud*" is not used in the bill, that the matter I have alluded to at the outset of these observations relates, and which has been strongly pressed upon me by the Plaintiff's counsel. I mean, the fact, that the deeds executed by the Plaintiff, as grantor of the annuities to Mr. *Smith* and Sir *John Wilson*, recited that the Plaintiff was tenant in tail in remainder expectant on the decease of his father, whereas his interest is limited to a life estate; and that declarations asserting his interest to be an estate tail were prepared for him, and were in fact made by him in solemn form, on both occasions. Little point was made of this fact by the Defendants' counsel, because it appears that the validity of the deed of appointment of *August*, 1851, could not be impeached. In my opinion, this matter has no direct bearing upon

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the case. It is, in my opinion, certain, that all the parties concerned knew or ought to have known and had received distinct notice, that the Plaintiff was only tenant for life in remainder. What the object of introducing this recital was I abstain from examining in any detail; it is a matter not creditable to anyone concerned in it, not certainly to the person who introduced the recital into the deeds, or prepared the statutory declarations, still less to the Plaintiff, who knowingly made that declaration and who executed the deeds containing the recital. I will not pursue the subject further, because, as far as it tells in favor of the Defendants and against the Plaintiff, in my opinion, it does not in any respect establish against the Defendants a case of fraud, and so far as it tells against the Plaintiff, it can but go to discredit his testimony. But in truth, there is not, in this case, upon any important point any conflict of testimony, and if there were, I do not proceed upon the Plaintiff's evidence, or indeed upon the evidence of the witnesses adduced in his favor, although no objection could be made to their testimony. I proceed upon the Defendants' testimony, and it is upon the facts proved and admitted by them, that I have come to the conclusion, that this transaction of *April*, 1855, is one, which, having regard to the principles which bind a Court of Equity in such cases, cannot be allowed to stand.

I must, therefore, in the case of *Bromley* v. *Smith* make a decree, to the effect, that on payment by the Plaintiff of the sums advanced to him by Mr. *Smith* and Sir *John Wilson*, together with interest at 5*l. per cent. per annum*, the deeds must be delivered up to be cancelled, and in taking that account, they must give credit for the sums paid to them in respect of their respective annuities. The *Albert Life Insurance Company*

pany must also refund the sums paid to them, and must deliver up the mortgage deed to be cancelled.

At one time, in the course of the argument, it passed through my mind, that the effect of annulling the transaction of 1855 might be to set up the transaction of *December*, 1853, but that is not my opinion. I mention it now for the purpose of guarding against any supposition of the kind, in founding the decree I pronounce, that the part of that transaction which was not annulled by the deed of *April*, 1855, still remains.

The *Albert Company*, however, must repay all the sums received by them as the price of the annuities granted by them in *April*, 1855, which will now be put an end to, and as two of the annuities which were granted by them in *December*, 1853, which would have expired by the decease of Sir *Robert Bromley*, were continued in *April*, 1855, the sums received by them will have to be accounted for, and they must be charged with interest upon the sums received by them, at the same rate as that which the Plaintiff will have to pay. Of course, in taking these accounts, they will be allowed credit for all sums paid by them for or on account of the Plaintiff, which will include all the costs and expenses in both transactions which have already been charged to him, and which, in my opinion, are not now to be thrown on any other person, and it will also include all sums paid by the *Albert Life Insurance Company* in the shape of annuities to Mr. *Smith* and Sir *John Wilson*, who will have to give credit in the shape of those sums, as far as they will extend in discharge; first, of the interest and then of the capital to be found due to them in respect of the sums advanced by them, but I do not intend by giving such directions to take the account of the interest and capital on any principle

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of rests, merely the whole amount, then pay interest and then capital. In fact, I treat it as all one transaction; and as far as possible I unravel the whole.

The suit to enforce these securities by Sir *Henry Porter Smith* and by the executors of Sir *John Wilson* to enforce the security of the testator must be dismissed.

The Plaintiff must pay the costs of the first suit, so far as charges any fraud or collusion, but he is entitled to the rest of the costs of the suit.

I am bound to say, and it appears from what I have already stated, in the course of the observations I have made, that I should not be disposed to give the Plaintiff any more relief than I am absolutely obliged, and certainly that feeling is not shaken by anything that was derived from his examination.

It remains still to say a word respecting the Attorney-General, who has been made a party to the first suit in respect of the judgment of outlawry against the Plaintiff. According to my experience, it is unusual, and, according to my opinion, it is erroneous, to make the Attorney-General a party, unless for the purpose of some matter relating to the validity or enforcement of the outlawry. And in the present case, I am of opinion that that suit must be dismissed against the Attorney-General with costs.

[Sir *R. Bethell.* The *Albert Company* have under their deed effected policies on the life of the Plaintiff, and have paid the premiums payable under the Plaintiff's covenant. They are entitled to be allowed these premiums on giving up the policies.]

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I apprehend not. There was nothing to compel them to insure; it was done for their own security. I had to consider that point in *Pennell* v. *Millar* (*a*). The company may sell the policies for what they are worth. I set aside the whole transaction.

June 4.

The Court having permitted the case to be mentioned again as to the costs of the first suit,

Mr. *Lloyd* and Mr. *Schomberg*, for Mr. *Smith*, argued, that in cases like the present, where a purchase of a reversionary interest was set aside for mere inadequacy of price, the rule was, to treat the suit as a redemption suit, and to give the Defendants their costs; *Gwynne* v. *Heaton* (*b*); *Earl Portmore* v. *Taylor* (*c*); *Peacock* v. *Evans* (*d*); *Twisleton* v. *Griffith* (*e*); *Gowland* v. *De Faria* (*f*); *Bowes* v. *Heaps* (*g*); *Boothby* v. *Boothby* (*h*); *Edwards* v. *Burt* (*i*).

Mr. *Follett* cited *Bawtree* v. *Watson* (*k*).

Mr. *Selwyn* referred to *Baker* v. *Wind* (*l*).

Mr. *R. Palmer*, for the Plaintiff, cited *Mocatta* v. *Murgatroyd*

(*a*) 23 *Beav.* 172.
(*b*) 1 *Bro. C. C.* 1.
(*c*) 4 *Sim.* 182.
(*d*) 16 *Ves.* 512.
(*e*) 1 *P. Wms.* 310.
(*f*) 17 *Ves.* 20.
(*g*) 3 *Ves. & B.* 117.
(*h*) 15 *Beav.* 212; 1 *Mac. & G.* 604.
(*i*) 2 *De G., Mac. & G.* 64.
(*k*) 3 *Myl. & K.* 339.
(*l*) 1 *Ves. Sen.* 160.

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June 7.

On looking into the cases cited in *Bromley* v. *Smith*, I think the decree must be made without costs. I still think that those passages of the bill which impute to the Defendants systematic conspiracy must be dismissed with costs, and the rest of the bill without costs.

The other two suits will be dismissed with costs.

(*a*) 1 *P. Wms.* 393.
(*b*) 1 *Ves. sen.* 160.
(*c*) 1 *Eden*, 169.
(*d*) 1 *Jac. & W.* 197.
(*e*) 14 *Sim.* 79.
(*f*) 2 *Coll.* 621.
(*g*) 3 *Madd.* 417.
(*h*) 5 *Sim.* 511.
(*i*) 5 *Myl. & Cr.* 270.
(*k*) 26 *Beav.* 161.

AN

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A testator directed that, as his sons attained twenty-five, his executors should pay them a share of his estate and effects, it being his will that his sons and daughters should receive equal shares of his estate. And as his daughters attained twenty-five, the executors were to invest 1,000*l.* each for them for life, and the difference between this and their share paid to them. In case any daughter "should die without issue," the 1,000*l.* was to be divided "amongst such of his children as might be then living, and the issue of such as might be dead, share and share alike," the issue to take the like share as the parent would, if living, have been entitled to. Held, that the gift over was on an indefinite failure of issue; that there was an absolute gift of the 1,000*l.* in the first instance to the daughters, which had not effectually been cut down, and that the daughters were absolutely entitled to the 1,000*l.* *Webster* v. *Parr.* Page 236

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A testator devised all the freeholds to which he might be entitled at his decease, "situate in the parish of *C.*, with their appurtenances." Held, that it did not pass pieces of land in two other parishes, which had always been let with the lands in *C.* as one farm, and occupied by the same tenant. *Evans* v. *Angell.* Page 202

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Parties entered into a contract to purchase a brewery and plant at a price to be fixed by arbitrators, who were to choose an umpire before entering upon the valuation. The arbitrators could not agree on an umpire. Held, that the Court had no authority, under the 17 & 18 *Vict.* c. 125, ss. 1, 2, to appoint an umpire for such a purpose. *Collins* v. *Collins.* 306

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1. A wife was entitled to an annuity for her separate use, which was payable out of a mortgage on her husband's estate. The wife lived with her husband and was maintained by him. The wife's trustee neglected to enforce payment of the mortgage and interest, and was held liable for the breach of trust. Held, that as between the husband and wife, the interest applied to their mutual benefit must be taken in discharge of her annuity, and that the trustee, as against the wife, was entitled to the benefit of the same equity. But held also, that the accruing payment of the annuity could not be set off against a prior existing debt of the husband. *Payne* v. *Little.* Page 1

2. By a marriage settlement, a debt due from *A.* was assigned to *A.* and *B.*, upon trust, "with all convenient speed," to get in and invest in Consols. For two and a half years *B.* took no steps to get in the money, and *A.* then became bankrupt: Held, that *B.* was responsible for the loss. *Grove* v. *Price.* 103

3. Directors of a company, on the transfer of its business to another company, received from the latter a large sum for compensation, the particulars of which they withheld from their members. Held, that they were trustees of the money for the members, and they were ordered, on an interlocutory application, to pay it into Court. *Gaskell* v. *Chambers.* (No. 3.) Page 360

4. The directors of a Building Society had (as it was held) power to invest unemployed moneys in the purchase of freeholds. Having only 621*l.* in hand, they contracted for the purchase of an estate for 2,300*l.*, payable by instalments. In the treaty, they held themselves out as a Land Society, and they paid 800*l.* on account, in cheques signed, by their order, by the trustees, who were not directors: —Held, first, that the directors committed a breach of trust, and were liable to replace the 800*l.*; secondly, that the vendor was under no liability; and, thirdly, that the trustees, who had only acted ministerially, under the directors, were not liable, notwithstanding there was some informality in the authority given to them by the directors. *Grimes* v. *Harrison.* 435

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lease. The plaintiff instituted a suit to obtain an unrestricted lease. The restricted parol agreement being established by extrinsic evidence, Held, that the bill must be dismissed. The plaintiff having then elected to take a brewers' lease, a decree was made, the plaintiff paying the costs of the suit. *Barnard* v. *Cave.* Page 253

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3. A rule of a benefit building society directed that unemployed money should be invested "in such manner and upon such legal security" as the board of directors should deem necessary: Held, that it might be invested in the purchase of freeholds. *Ibid.*
4. The estimated probable duration of a benefit building society was thirteen years. Held, on the rules and terms of the mortgage deed, that an advanced member was entitled to redeem on payment of his subscriptions to the end of the thirteen years, although he was still liable, under the rules, to continue to pay subscriptions until 120*l.* a share had been realized for every member. *Sparrow* v. *Farmer.* Page 511
5. A bill by a retiring member of a benefit building society against the trustees, to recover the plaintiff's share, was supported, and enquiries and accounts were directed. Held, also, that a rule to refer to arbitration did not oust the jurisdiction of this Court in such a case. *Smith* v. *Lloyd.* 507

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1. Where shares not fully paid up are specifically bequeathed, the question, whether the specific legatee or the residuary estate is liable to the future instalments, depends on whether the calls are actually made before the testator's death. *Addams* v. *Ferick.* 384
2. A testatrix bequeathed shares in a company. Before her death, three calls were authorized at stated intervals, but she died before two of these periods: Held, under the circumstances and from the practice of the company, that the calls were not to be considered as really made until a call letter had been sent to the shareholders, and that as to those sent after the testatrix's death, the specific legatee, and not the residuary estate, must bear the calls. *Ibid.*

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Directors of a company were prohibited giving bills of exchange; but they had powers to borrow on mortgage. They, however, gave bills to secure an existing debt, and a mortgage was, at the same time, executed, under the seal of the company, which was made subject to redemption on payment of the bills:—Held, first, that the mortgage was given to secure the debt, and not the payment of the bills, and therefore was not invalid on that account; and, secondly, that upon a bill of foreclosure by the mortgagee, the deed of the company must be treated as valid, until set aside by an independent proceeding. *Scott* v. *Colburn.* Page 276

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1. The case of *De Visme* v. *De Visme* (1 *Mac. & Gor.* 336), is overruled. *Vickers* v. *Hand.* 630
2. Where conditions of sale fix periods for the delivery of the abstract, the completion of the purchase, and from which interest shall run, "if from any cause whatever" the purchase should not be completed, the purchaser must pay interest from the time

fixed, though the completion is delayed beyond the time specified, in consequence of the state of the title, if there be no fraud or wilful delay on the part of the vendor. *Vickers* v. *Hand.* Page 630

3. By conditions of sale the abstract was to be delivered before the 18th of *February*, the purchaser was to take the rents from the 25th of *March*, and the purchase was to be completed on the 24th of *June*. And if, from any cause whatever, the completion should be delayed after that time, the purchaser was to pay interest at 5*l*. per cent. Imperfect abstracts were delivered, and a complete abstract was not delivered until the 17th of *June*. Further delay having occurred in completing, the vendor deposited the purchase-money at a banker's, and gave notice in *August* that he would pay no interest. Held, that as there was no fraud or wilful delay on the part of the vendors, and as the delivery of an imperfect abstract arose simply from the state of the title, the purchaser must pay interest. *Ibid.*

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CONTRACT.

When the terms of a contract are plain, usage can little affect the construction to be placed upon it; but when it is ambiguous, the usage for a long time may influence the judgment of the Court, by showing how it was understood by the original parties to it. *Boldero* v. *The East India Co.* Page 316

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A testator desired that every legatee under his will should "contribute £1 per cent. out of their legacies to Mrs. *W.* and her children. Held, that the specific legatees and annuitants and residuary legatee (both in respect of the residuary personal estate and of the produce of real estate directed to be converted) were bound to contribute. *Ward* v. *Grey.* 485
See RESIDUE, 1, 2.

CONTRIBUTORY.

1. *A.* gave to *B.* a cheque for 50*l*. to obtain fifty shares in a company. *B.* applied for fifty shares, and they were allotted to *A.*, and his name was entered in the books, &c. as a shareholder. It did not appear that anything had been

done further than that *A.* had refused to sign the deed:—Held, that not having repudiated the shares, he was a contributory. Held, also, that a change in the company's books in the number of the shares first allotted to *B.* did not relieve him from his liability. *The Electric Telegraph Company of Ireland. Cooney's Case.* Page 6

2. Prior to the Joint Stock Companies' Registration Act, an unincorporated company was established, whose shares passed by delivery. The Court (without expressing any opinion on the legality of the company) held, that a holder of shares at the date of the winding-up order, who was not an original allottee, but had purchased them and received dividends, was a contributory; liberty was reserved to him to move to discharge the winding-up order, on the ground of the illegality of the company. *Barclay's Case. In re The Mexican and South American Mining Company.* 177

3. Shares in a scrip company passed by mere delivery. Held, that *London* bankers, who had in their hands, at the date of the winding-up order, shares belonging to foreign correspondents, and on which they had received the dividends, were not contributories. *Finlay Hodgson's Case. In re The Mexican and South American Mining Company.* 182

4. Where, by false representations of the directors of a company, a stranger is induced to take shares directly from the company, the transaction is not binding in equity, and he is not a contributory. But if, by such representations of the directors, he takes them from a third party, he is a contributory. *Durenty's case. In re The Liverpool Borough Bank.* Page 268

CONVERSION.

Where a testator directs a sale of his real estate for purposes which wholly fail, the heir takes it as realty: but if the failure be only partial, he takes it as personalty. *Bagster* v. *Fackerell.* 469

COPYHOLD.

See FINES (ADMISSION).

CORPORATION.

See CROSS BILL.
MUNICIPAL CORPORATION.

CORPUS.

See POWER, 1.

COSTS.

1. On setting aside a voluntary settlement, made by a trader while insolvent, in favor of his wife and an infant child, the Court, as to the costs of the trustees and infant, Held, that the utmost it could do was to make the decree without costs. *Elsey* v. *Cox.* 95

2. In a transferred *Exchequer* case, the Court was only authorized by the act to order the costs of re-investment of the purchase-money of lands compulsorily taken by a corporation. Parties having become absolutely entitled, applied for payment to them out of Court of the money, instead of re-investing it. Held, that the corporation must pay the costs. *In re The Tiverton Market Act.* (No. 2.) Page 239

3. One reference having been made to settle a scheme as to twenty charities, the costs were paid out of an existing available fund belonging to three of them. But it was ordered that they should be ultimately borne rateably by the twenty charities. *Re The Stafford Charities.* 567

4. Costs of a suit to administer both real and personal estate, and to ascertain the rights to both, were Held payable, primarily, out of the personal estate, notwithstanding the personal estate was, by the will, exonerated from payment of the debts and the costs and charges of proving the will. *Stringer* v. *Harper.* (No. 2.) 585

5. A suit was instituted to set aside a charge on a reversion, and a cross suit to establish it. It being set aside for inadequacy of consideration merely, and a decree for redemption being made, the grantor was ordered to pay the costs of charges of fraud which had not been substantiated, but no costs were given as to the revivor of the first suit. The cross suit was dismissed with costs. *Bromley* v. *Smith.* Page 646

6. A dealing by an expectant heir being set aside: Held, that he must bear the costs paid for the securities. *Ibid.*

See EXECUTOR.
MORTGAGE, 3.
SEVERANCE OF DEFENCES.
TAXATION.
TRADE MARK.

COUNSEL'S FEES.

See TAXATION, 2.

COVENANT.

See DILAPIDATIONS.
LANDLORD AND TENANT.
LEASE.

CREDITOR.

See EXECUTOR.
STATUTE OF LIMITATIONS, 3, 4.

CREDITORS' REPRESENTATIVE.

The creditors' representative appointed under the 20 & 21 *Vict.* c. 78, is entitled to attend on the settlement of the list of contributories. *In re The Mexican and South American Mining Company.* (No. 1.) 172

CREDITORS' SUIT.

See DECREE, 2.

CROSS BILL.

Directors of a company were prohibited giving bills of exchange; but they had powers to borrow on

mortgage. They however gave bills to secure an existing debt, and a mortgage was, at the same time, executed, under the seal of the company, which was made subject to redemption on payment of the bills:—Held, first, that the mortgage was given to secure the debt, and not the payment of the bills, and therefore was not invalid on that account; and, secondly, that upon a bill of foreclosure by the mortgagee, the deed of the company must be treated as valid, until set aside by an independent proceeding. *Scott* v. *Colburn.* Page 276

See FRAUD ON POWER.

CROSS EXAMINATION.

1. On a motion for a decree the plaintiff's affidavit in reply was filed on the 4th of *August*. The Defendant took no steps to cross-examine until after the Long Vacation, and he then asked, that the cause might stand over, to enable him to cross-examine the Plaintiff. Held, that he was not entitled as of right, and that it was matter of discretion, and the Court having heard the cause, and seeing no necessity for a cross-examination, made a decree. *Bourdillon* v. *Baddeley.* 255

2. On a notice of motion for a decree, the Plaintiff had given notice to use the answers of some of the Defendants. Held, that he might cross-examine those Defendants on their answers, without prejudice to the right of the other Defendants to object to the cross-examination being used against them. But held, also, that the Plaintiff could not examine, in chief, other witnesses not mentioned in his notice of motion for a decree. *Rebden* v. *Wesley.* Page 432

CROWN.

See OUTLAWRY.
RESIDUE, 5.

CUMULATIVE LEGACY.

A testator gave a legacy of 7,000*l.* to his wife, and other similar legacies. By a codicil, he gave a legacy of 6,000*l.* to his wife and other legacies, and he directed "that so far as the codicil was in addition to any testamentary document he had already made, he wished it to take effect, and not cancel or revoke any prior document which might exist." Held, that the legacies were cumulative. *Townshend* v. *Mostyn.* 72

DAMAGES.

See VENDOR AND PURCHASER.

DEBENTURE.

Debenture holders under an Act were to be entitled *pari passu.* One debenture holder attempted to obtain an advantage over the rest by means of additional mortgage. Held, that it was invalid. *De Winton* v. *Mayor, &c. of Brecon.* 533

DEBTOR AND CREDITOR.

A. B. effected a policy for securing a judgment debt due from him to *C. D.* *C. D.* afterwards obtained a second judgment against *A. B.* for a second debt. *A. B.* then conveyed real estate to trustees for sale, and to pay *A. B.* two judgments. After this *C. D.* obtained a third judgment against *A. B.* *C. D.* subsequently recovered the amount of the policy, and, concealing that fact, he received the whole amount of the first two judgments from the trustees. Held, that he was entitled to retain all the moneys so received in payment of the three judgment debts, and could not be compelled, at the suit of *A. B.* or his representatives, to apply the policy money in satisfaction of the first judgment, and refund the difference between the sum paid by the trustees and the policy money. *Spalding* v. *Thompson.* Page 637

DEBTS.

See EXONERATION.
FORFEITURE.

DECREE.

1. Decree made on motion allowed to be varied on motion and without petition of appeal. *Hughes* v. *Jones.* 24
2. Form of decree as to costs in the case of two creditors' suits, when one is stayed after a decree in the other. *Canham* v. *Neale*; *Cobbold* v. *Neale.* 266
3. An order drawn up in the Registrar's office, in the absence of a Defendant, will not be set aside where no error is shewn. *Smith* v. *Acton.* (No. 2.) Page 559

See MINUTES.
SPECIFIC PERFORMANCE, 1.

DEED.

See BANKERS.
MACHINERY.

DEMISE.

See LANDLORD AND TENANT.
LEASE.

DEVASTAVIT.

By the 4 & 5 *Will. & M.* c. 20, judgments not docketted were not to have any preference against executors, &c. in administration of estates. The 2 & 3 *Vict.* c. 11, closed the docket. Held, that the old law was thereby revived, and the administrator had committed a *devastavit* by paying a simple contract debt before a judgment debt, even though he had no actual notice of the latter. *Fuller* v. *Redman.* (No. 1.) 600

DEVISE.

The word "son," in connexion with the words "heir" and "issue," held, by force of context, to mean issue male. *Jenkins* v. *Lord Clinton.* 108

See APPURTENANCES.
FEE SIMPLE.
MORTGAGE, 1, 2.
REFERENTIAL TRUST, 2.
WILL *and its References.*

DILAPIDATIONS.

Covenant by farm tenant "well and substantially" to repair and keep in "good substantial repair," and so "well and substantially repaired" to yield up at the end of the term: Held, that the tenant was bound to give up the premises in as good a state of repair as when he took possession, and that they must be inferred to have been then in a tenantable state. The landlord having become changed during the term, and a claim for dilapidations being now made by the existing landlord, held, that the tenant was entitled to an inquiry as to the state of repair when the present landlord's title accrued. *Brown* v. *Trumper*. Page 11

See LANDLORD AND TENANT.

DIRECTORS.

See BREACH OF TRUST, 3, 4.
CROSS BILL.
PUBLIC COMPANY.

DISCLAIMER.

A Defendant who disclaims in a suit cannot, in that suit, maintain a claim against his co-Defendant in respect of the right disclaimed. *Jolly* v. *Arbuthnot*. 283

DISCOVERY.

See INJUNCTION, 1.

DISMISSAL FOR WANT OF PROSECUTION.

A Defendant who has taken the benefit of the Insolvent Debtors' Act may move to dismiss for want of prosecution. *Levi* v. *Heritage*. 560

DISSOLUTION.

See PARTNERSHIP.

DONATIO MORTIS CAUSA.

Immediately before her death, the deceased told *A*. to take the keys of a dressing-case and box, containing a watch and trinkets, and immediately on her death to deliver the watch and trinkets to the Plaintiff. *A*. did so. Held, that this did not constitute a valid *donatio mortis causa*. *Powell* v. *Hellicar*. Page 261

DYING WITHOUT ISSUE.

See ABSOLUTE INTEREST.
ESTATE FOR LIFE, 2.

EAST INDIA COMPANY.

A fund was created for providing retiring pensions of 1,000*l*. a-year for civil servants of the *East India* Company in *Bengal*, after twenty-five years' service. The fund was derived from a deduction of 4*l*. per cent. on the salaries, with an equal amount contributed by the *East India* Company. A scale of the values of the annuities, according to the ages of the annuitants, was fixed, and upon a member's retiring with an annuity, if the amount paid by him, together with its accumulations, were less than one-half of the tabular value of his annuity, he was bound to make up the deficiency. The contrary happened to the Plaintiff, who had paid 4,469*l*. more than the half value. Held, that he was

not entitled to have the excess refunded. *Boldero* v. *The East India Company.* Page 316

EJUSDEM GENERIS.

Bequest of "all my household furniture and effects, plate, linen, china, glass, books, wearing apparel, *et cætera.*" Held, to pass the articles enumerated and others *ejusdem generis*, but not the general residue. *Newman* v. *Newman.* (No. 2.) 220

EQUITABLE ASSETS.

Surplus produce of the sale, under the Court, of leaseholds for lives mortgaged by the testator. Held, legal, and not equitable assets. *Christy* v. *Courtenay.* 140

ESTATE FOR LIFE.

1. A testator bequeathed the residue to trustees, upon trust to permit his wife to receive the annual produce during her life, and also to apply to her own use such parts of the capital as she should think proper, and after her decease to stand possessed thereof, upon trust for such persons as she should by will appoint, and in default upon trust to pay certain legacies: Held, that the widow took a life estate only, with power of disposition of the capital during her life and of appointment by will, and not an absolute interest. *Scott* v. *Josselyn.* 174

2. Bequest of leaseholds to *A.* for life, and at her death, to *B.* and her children; but if they should die without issue, to *C.* *B.* had no children at the death of the testator or in the life of *A.* Held, that *B.* took for life, with remainder to her children. *Semble*, that *Wild's case* (6 *Co. Rep.*) does not apply to personalty. *Audsley* v. *Horn.* Page 195

See PARENT AND CHILD, 1.

ESTATE TAIL.

General intent to create estates tail held to prevail, notwithstanding inconsistent expressions. *Jenkins* v. *Lord Clinton.* 108

EVIDENCE.

The evidence taken by any parties to a cause may be used by any of the other parties. *Sturges* v. *Morse.* 562

See CROSS EXAMINATION.
EXTRINSIC EVIDENCE.

EXECUTION OF POWER.

A. B. had a power to appoint "by his will or any writing in the nature of or purporting to be his will, or any codicil thereto." On his death, the third and fourth sheets of a will were alone discovered, and which were in the hand-writing of and signed by *A. B.*, and were attested by two witnesses; one of them contained, in words, a perfect appointment. Probate having been refused, Held, that this was not a valid execution of the power to appoint by writing "purporting to be a will." *Gullan* v. *Grove.* 64

EXECUTOR.

An executor administered an estate, and paid over the residue. Ten years after, a creditor of the testator brought an action of covenant against the executor, who filed a claim for administering the estate and a bill to make legacies standing in the joint names of the executor and legatee applicable to the payment of the debt. The debt was paid out of the legacy, but Held, that the executor was entitled to no costs of the action or suits. *Noble* v. *Brett.* (No. 2.) Page 233

See INDEMNITY.
RESIDUE, 4, 5.

EXECUTION OF POWER.

See FRAUD ON POWER.
POWER, 2.

EXONERATION.

A testator bequeathed his personal estate to his wife, "discharged from the payment of his debts." He then devised his real estate in *Herefordshire* in trust to sell and pay "all his just debts, funeral and testamentary expenses" in exoneration of his personal estate, and he devised his real estates in *Norfolk*, without any expressed trust, for payment of his debts. The produce of the *Herefordshire* estates being insufficient to pay the debts, Held, that the *Norfolk* estates were next liable to pay them in exoneration of the personal estate. *Young* v. *Young.* 522

EXPECTANT HEIR.

An expectant heir charged his reversion in 1853, and afterwards in 1855 to the same parties. The second transaction cancelled the first. The second being set aside by the Court: Held, that the first was not revived. *Bromley* v. *Smith.* Page 644

See POLICY.
REVERSIONARY INTEREST.

EXTRINSIC EVIDENCE.

As to what extent extrinsic evidence is admissible. *Evans* v. *Angell.* 202

See BREWERS' LEASE.

FEE SIMPLE.

A testator appointed *A. B.* "his universal heir." Held, that these words were sufficient, if uncontrolled, to give the fee-simple. *Jenkins* v. *Lord Clinton.* 108

See "OR" READ "AND," 2, 3.

FINES (ADMISSION).

The fines, fees and expenses of the admission of new trustees to copyholds must be borne by the tenant for life and those in remainder, in proportion to their respective interests. *Carter* v. *Sebright.* 374

FIXTURES.

See MACHINERY.

FLOATING BALANCE.

See BANKERS.

FORECLOSURE.

See COMPANY.
PLEADING.

FORFEITURE.

A testator commenced building a column on his estate, which was only half finished at his death. By his will, he declared that if the devisee for life of his estates "should neglect to keep in complete repair the column then being erected," he should forfeit his estate. Held, that this implied no obligation on the executors to complete the column out of the testator's assets. *Joliffe* v. *Twyford.* Page 227

FRAUD.

See CONTRIBUTORY, 4.

FRAUD ON POWER.

A tenant for life had power to appoint, to any of his children, an estate, which, in default, was limited to his eldest son in fee. The eldest son attained twenty-one in *January*, 1841, and in *February* the father appointed the estate to him absolutely. In *May*, the father and the son mortgaged the estate for the father's debts, and in *July* the father and eldest son conveyed the estate to a trustee, to indemnify the son against the mortgage debts, and then to sell and divide the surplus between all the children equally. *Semble*, that the latter deed was not void as part of a transaction constituting a fraud on the power; but Held, that the deed of *July* must be treated as valid until set aside by an independent proceeding for that purpose in a suit, by a younger child, to carry it into execution. *Beddoes* v. *Pugh.* Page 407

See POWER, 2.

FRAUDULENT SETTLEMENT.

See COSTS, 1.
VOLUNTARY SETTLEMENT.

FREEHOLD LAND SOCIETY.

See BUILDING SOCIETY, 1, 2.

FREIGHT.

See SHIP.

GIFT.

See PARENT AND CHILD, 4, 5.

GOODWILL.

The terms "goodwill, &c.," in a contract for the sale of a foundry, are not so uncertain as alone to prevent a decree for specific performance of it; for the words *et cætera* point to things necessarily connected with and belonging to the goodwill, and to be defined in the conveyance. *Cooper* v. *Hood.* 293

HEIR.

See CONVERSION.
DEVISE.
WILL, 2.

HUSBAND AND WIFE.

1. A wife was entitled to an annuity

for her separate use, which was payable out of a mortgage on her husband's estate. The wife lived with her husband and was maintained by him. The wife's trustee neglected to enforce payment of the mortgage and interest, and was held liable for the breach of trust. Held, that as between the husband and wife, the interest applied to their mutual benefit must be taken in discharge of her annuity, and that the trustee, as against the wife, was entitled to the benefit of the same equity. But held also, that the accruing payment of the annuity could not be set off against a prior existing debt of the husband. *Payne* v. *Little.* Page 1

2. A wife obtained an order for protection under the 20 & 21 *Vict.* c. 85, s. 21. Held, that she was entitled to payment of a fund in Court representing a legacy bequeathed to her. *In re Kingsley's Trust.* 84

See LEGAL PERSONAL REPRESENTATIVES, 2.

PROTECTION ORDER, 2.

ILLEGITIMATE CHILD.

1. Bequest to "*A.* and her daughters" equally. *A.* had an illegitimate daughter at the date of the will and never had any other daughter. *A.* predeceased the testator. Held, that legitimate daughters alone could take under this bequest, and that the construction was not altered by the circumstance, that, in the same will, there was a bequest to *B.* and her son *John*, the son *John* being illegitimate. *Kelly* v. *Hammond.* Page 36

2. Bequest to all and every the sons and daughters of *A.*, including who the illegitimate of *A.* Held, that the illegitimate children of *A.* could not take. *Mason* v. *Bateson.* 404

INCLOSURE.

An Inclosure Act directed allotments for public and specific purposes, and that one-fifth should be allotted to the lord of the manor for his interest in the "soil," and that the remainder of the common lands should be divided amongst the commoners, to be held in severalty. And it was declared that the lord's seignorial rights were not to be prejudiced, except the right to the "soil," and that the lord might thereafter enjoy all rents, heriots, &c., "and all mines, minerals, quarries and other royalties," and as if the Act had not been passed. Held, that the lord retained his rights to the mines and minerals under the land allotted to the commoners in severalty. *Pretty* v. *Solly.* 606

See SOIL.

INDEMNITY.

Executors held entitled to no indemnity against liability in respect of shares in a banking company spe-

cifically bequeathed, the order of the Court, in an administration suit, being of itself a perfect indemnity to them. *Addams* v. *Ferick.* Page 384

INFANT.

Trustees applied a part of the capital of a fund belonging to infants, who had been left destitute by the father, for their benefit. They were allowed the amount. *Prince* v. *Hine.* 634

See PARTITION.

INJUNCTION.

1. As to the right of a Plaintiff in a bill of discovery, in aid of an action at law, to an injunction to restrain the action until full discovery is given: *Semble*, that a *primâ facie* case must be shewn, and that the Court will not allow a contest on affidavit on a motion for such an injunction. *Harris* v. *Collett.* 222
2. An injunction was granted to stay an action at law until answer. The Defendant having put in a full answer, gave notice of motion to dissolve, after which, the Plaintiff amended his bill. The answer shewing a mere legal question: Held, that the injunction must be dissolved, and that the Plaintiff was not, on this occasion, entitled to have it continued on the case alleged by the amendments. *Mollett* v. *Enequist.* (No. 2.) 466

See RAILWAY.

INSOLVENT.

See DISMISSAL FOR WANT OF PROSECUTION.

INTEREST.

A testator died in 1818. *A. B.*, his administrator, received assets and placed them in a bank, to an account—"*A. B.*'s trustee," and where they still remained. *A. B.* died in 1853, and to a suit, instituted by the administrator *de bonis non* of the original testator against the representatives of *A. B.* and the bankers, to recover the fund, the representatives of *A. B.* set up the Statute of Limitations, but the bankers were willing to pay the amount:—Held, that the statute was inapplicable, and a decree was made for the Plaintiff. Held also, that in such a suit, the representatives of *A. B.* could not be charged with interest. *Smith* v. *Acton.* Page 210

See CONDITIONS OF SALE.

STATUTE OF LIMITATIONS, 1.

ISSUE.

1. The word "issue" restricted to "children" by force of the correlative expression "parent." *Maynard* v. *Wright.* 285
2. A testator devised a freehold in trust to accumulate the rents for periods of not less than ten years successively at a time, at the expiration of which, the accumulations to be paid to the testator's "sons and daughters, or such of

them as should be living at the respective periods of division, and the issue of such of them as shall have died leaving issue, such issue taking their deceased parent's share," to be vested interests in the same respectively at the age of twenty-one years, and so on from time to time until the expiration of twenty-one years after the decease of the survivor of her children. And from and after the expiration of the term of twenty-one years, he devised the same premises unto such of his grandchildren and their issue as should then stand, in respect to him, in equal degree of consanguinity, and their heirs, as tenants in common. Held, that "issue" was to be read "children," and the word "and" to be read "or," and that the devise was neither void for remoteness nor uncertainty. *Maynard* v. *Wright*.
Page 285

See DEVISE.

ISSUE MALE.

See WILL, 2.

JUDGMENT.

See CHARGING ORDER.
DEBTOR AND CREDITOR.
DEVASTAVIT.
MUNICIPAL CORPORATION, 2.
TACKING.

JURISDICTION.

1. As to the jurisdiction of the Court of Chancery of the Palatine of *Lancaster* in cases where part of the subject-matter consists of lands locally situate out of its jurisdiction. *Wynne* v. *Hughes*.
Page 377

2. Suits were instituted for the same matter in the Palatine Court and this Court, and a decree made in the former. The Court refused to stay the proceedings here, as the suits partly involved lands locally situate out of the jurisdiction of the Palatine Court. *Ibid.*

JURY.

The Court will not, before the hearing, direct a case to be heard before a jury under the 21 & 22 *Vict.* c. 27, s. 2, if one party opposes it. *George* v. *Whitmore*. 557

LACHES.

See REVERSIONARY INTEREST, 2.
SPECIFIC PERFORMANCE, 4, 5.

LANCASTER.

See JURISDICTION.

LANDS CLAUSES ACT.

1. Upon a petition presented by the tenant for life, for the re-investment in land of the compensation money paid for lands taken by a railway company, the remainder-

men and trustees, if they approve, ought to join in the petition or abstain from appearing at the hearing. *Wilson* v. *Foster*. *Re The Lancashire and Yorkshire Railway Company*. Page 398

2. Costs of remaindermen and trustees, who appeared as respondents upon a petition presented both under the Lands Clauses Acts and in a suit for re-investment in land, disallowed. *Ibid.*

See COSTS 2.

LANDLORD AND TENANT.

Under a lease of a farm, the tenant was bound to keep in repair the buildings to be erected thereon. During the term, the tenant, with the permission of the landlord, who was lord of the manor, built a house on the waste adjoining the farm, and he enjoyed it with the farm. Held, that the tenant was also under an obligation to keep this house in repair. *White* v. *Wakley*. (No. 1.) 17

See DILAPIDATIONS.

LEASE.

LAPSE OF TIME.

See REVERSIONARY INTEREST, 2.
SPECIFIC PERFORMANCE, 4, 5.

LEASE.

1. Demise for seven years, with a proviso, that, notwithstanding anything before contained, if notice should not be given to determine the lease at the end of the seven years, it should be considered a lease upon the same covenants, from year to year, until notice to determine it. Held, that the demise continued after the seven years until put an end to by notice, and that the covenants continued binding. *Brown* v. *Trumper*. Page 11

2. Covenant by farm tenant "well and substantially" to repair and keep in "good substantial repair," and so "well and substantially repaired" to yield up at the end of the term: Held, that the tenant was bound to give up the premises in as good a state of repair as when he took possession, and that they must be inferred to have been then in a tenantable state. The landlord having become changed during the term, and a claim for dilapidations being now made by the existing landlord, Held, that the tenant was entitled to an inquiry as to the state of repair when the present landlord's title accrued. *Ibid.*

See LANDLORD AND TENANT.

LEGACY.

A testator bequeathed, first, to the minister of *M.* a sum of [*blank*] for educating the poor; secondly, an annuity of 5*l.* a year to *A.* for life, and after her death, to the minister of *M.*, in addition to the sum of [*blank*] for educating the poor of *M.*; and, thirdly, an annuity of 15*l.* to *B.* for life, and after his decease he gave to the minister of *M.* the said sum of [*blank*] in addition to the two sums before mentioned. Held,

that the corpus producing the annuity was well given to the charity, subject to the life interests. *Hartshorne* v. *Nicholson*. Page [illegible]

See [illegible].

[illegible]

[illegible]

[illegible]

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[illegible]

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[illegible]

[illegible]

LEGAL PERSONAL REPRESENTATIVES.

1. Gift to "legal personal representatives share and share alike." Held to mean next of kin. *King* v. *Cleveland*. No. 1. [illegible]

2. Bequest to *A.* and his wife for their lives, and after their decease, in trust for their children "then living, or their legal personal representatives, share and share alike." A daughter died in the life of the testator, without leaving issue: Held, that her next of kin were entitled, and not her husband who had taken out administration to her. *Ibid.* No. 2. [illegible]

LEGATEE.

A testator gave 2,000*l.* in remainder to his sisters, except *A.*, and he then gave a legacy to *A.* He afterwards gave "to each of his sisters, namely, *B.*, *C.* and *D.*, 500*l.*" each, "and in case of death of either, their portion to go to the surviving sisters above mentioned. Held, that *A.* was not included among the surviving sisters. *White* v. *Wakley*. No. 2. Page 23

See Servants.

LETTER OF LICENCE.

See Statute of Limitations, 4.

LIEN FOR PURCHASE-MONEY.

A trustee purchased an estate on behalf of the trust. The vendor executed a conveyance to the trustee, which recited the trust, and that the trustee had called in trust moneys sufficient to pay the purchase-money, and it contained a receipt for the whole purchase-money. In fact only part was paid, and the trustee gave his bond and a memorandum of deposit for the deficiency, the latter reciting that the vendor had lent the trustee that sum to enable him to complete: Held, that the vendor had no lien on the title-deeds in his possession for the unpaid purchase-money. *Muir* v. *Jolly*. 143

See Solicitor and Client.

LIFE INTEREST.

See Estate for Life.

Parent and Child, 1.

Tenant for Life.

LIFE POLICY.

See Policy of Assurance.

MACHINERY.

1. Mortgage of iron works and rolling mill, with the machinery, &c. spe-

cified in schedule, "and all engines, machinery, fixtures and things which might thereafter be fixed and fastened in or upon the same premises, whether in addition or substitution." Held, that the words "fastened in or upon the same premises" governed the sentence, and that subsequent additions, consisting of an engine for turning a lathe, a steam hammer and anvil, a boiler and furnace, passed to the mortgagees; but that cutters, bed plate, straightening plate, and the metal flooring of the mill did not. *The Metropolitan Counties, &c. Society* v. *Brown.* Page 454

2. Under an assignment of the machinery fastened in or upon a mill, Held, that an anvil, though not fastened or fixed to it, passed, as essential to a fixed steam hammer. *Ibid.*

MAINTENANCE.

See INFANT.
POWER, 2.
SET-OFF.

MINERALS.

See INCLOSURE.
SPECIFIC PERFORMANCE, 6.

MINES.

See INCLOSURE.

MINUTES.

When, at the hearing, liberty is given to mention the case again on the minutes, it must be done at least within a fortnight, otherwise the parties must give notice of motion specifying the alterations. *Hood* v. *Cooper.* 373

MISTAKE.

See REFORMING DEED.

MONEY.

1. *South Sea* Stock and £3 : 5*s.* per Cents. held, on the context, to pass by the expression "surplus money." *Newman* v. *Newman.* (No. 1.) Page 218

2. A testatrix bequeathed specific sums of *South Sea* Stock and £3 : 5*s.* per Cents. to her sister for life, and, at her death, she left "this money" in trust to her niece, to pay certain legacies, which did not exhaust the whole. She authorized her sister and niece (who were her executrixes) to sell out the residue of "her money" in the £3 : 5*s.* per Cents. over the sum she had mentioned, for payment of her debts, and proceeded: "then, if there is any surplus money, I give it to my niece:"—Held, that the niece took the surplus of both the funds. *Ibid.*

MORTGAGE.

1. *A. B.* mortgaged estate *X.* for 800*l.*, and, on the same day, he charged estate *Y.*, in aid, to the extent of 200*l.* *A. B.* died, having devised estate *Y.*, but intestate as to estate *X.* Held, that the whole 800*l.* was, as between the devisees and heir, primarily chargeable on estate *X.* *Stringer* v. *Harper.* 33

2. An estate was subject to mortgages of 7,000*l.* created by the testator, and of 13,000*l.* created

by his ancestor; but the testator had consolidated them into one mortgage for 20,000*l.* which he had covenanted to pay. The testator directed his debts to be paid out of his personal estate, but if insufficient, he charged them on his real estate. He devised his real estates "subject nevertheless to the mortgages affecting the same." The testator died in 1840. Held, that the devisee of the estate did not take *cum onere*, but was entitled to have the whole mortgage debt paid out of the testator's personal estate. *Townshend* v. *Mostyn*. Page 72

3. A mortgagee of a 1,000 years' term filed a bill for foreclosure. At the hearing, by arrangement, a decree was made for the sale of the fee. It produced a little more than sufficient to pay the mortgage. The Defendants declining an inquiry as to the value of the reversion in fee, Held, that the Plaintiff's costs had priority over those of the Defendant. *Cutfield* v. *Richards*. 241

4. A testator gave one-third of the rents of his real estate to his widow for life, and he devised an estate at *B.*, in thirtieth parts, to his children as tenants in common. The residue of his real and personal estate, "after paying his mortgage and other debts," he left to be divided into thirtieth parts, and to be taken by the same and in the same proportions as the estate at *B.* Held, that the widow took no interest in the personalty, and that the mortgages were payable primarily out of the residue and not out of the mortgaged estate, under the 17 & 18 *Vict.* c. 113. *Greated* v. *Greated*. Page 621

See BUILDING SOCIETY, 4.
COMPANY.
DEBENTURE.
DEBTOR AND CREDITOR.
MACHINERY, 1.
MUNICIPAL CORPORATION.
PLEADING.
TACKING.

MORTMAIN.

See CHARITY.

MOTION.

See DECREE.
JURY.
SPECIFIC PERFORMANCE.

MOTION FOR DECREE.

See CROSS-EXAMINATION.

MUNICIPAL CORPORATION.

1. An Act of Parliament gave a corporation compulsory powers of purchasing land to make a market. The 29th section required it to sell the surplus not wanted, and to give certain parties a right of pre-emption, the produce to be applied "to the purposes of the Act." The 30th section gave the corporation power to borrow on debenture, the 32nd power to mortgage or sell any of its land "for the purposes of the Act," and the 83rd section provided that the Act should not empower the corporation to sell

without the approbation of the lords of the treasury. Held, that the 32nd section did not authorize a mortgage of the surplus land for the purposes of the Act, but that it must be sold as directed by the 29th section. Held, also, that a mortgage only of the lands of the corporation required the assent of the lords of the treasury. *De Winton* v. *Mayor of Brecon.* Page 533

2. Whether a judgment against a municipal corporation operates as an equitable mortgage on its lands, the Municipal Corporation Act forbidding a mortgage, except with the assent of the lords of the treasury, *quære*. *The Mayor, &c. of Brecon* v. *Seymour.* 548

NEW TRUSTEES.

Upon a petition to appoint new trustees of a separation deed, on the death of the sole trustee, it was objected, that the deed was void, in consequence of the father's thereby abandoning his right to the custody of his children. The Court declined on this occasion deciding as to its validity, but appointed new trustees to protect the property. *Re Matthews.* 463

NEXT OF KIN.

See LEGAL PERSONAL REPRESENTATIVES.

RESIDUE, 4, 5.

OPENING BIDDINGS.

On a sale under the Court, two persons agreed not to bid against each other, but that one should bid up to 1,500*l.* and divide the lot between them. They bought it for 650*l.* Held, that this agreement furnished no ground for opening the biddings, or annulling the sale. *In re Carew's Estate.* Page 187

"OR" READ "AND."

1. The word "and" construed "or," in order to give effect to the obvious meaning. *Maynard* v. *Wright.* 285

2. A testator devised a freehold in trust to accumulate the rents for periods of not less than ten years successively at a time, at the expiration of which, the accumulations to be paid to the testator's "sons and daughters, or such of them as should be living at the respective periods of division, and the issue of such of them as shall have died leaving lawful issue, such issue taking their deceased parent's share," to be vested interests in the same respectively at the age of twenty-one years, and so on from time to time until the expiration of twenty-one years after the decease of the survivor of her children. And from and after the expiration of the term of twenty-one years, he devised the same premises unto such of his grandchildren and their issue as should then stand, in respect to him, in equal degrees of consanguinity,

and their heirs, as tenants in common. Held, that "issue" was to be read "children," and the word "and" to be read "or," and that the devise was neither void for remoteness nor uncertainty. *Maynard* v. *Wright.* Page 285

3. A testator devised real estate to his children and their heirs as tenants in common, with a gift over to the survivors "in the event of any of them dying before having heirs of their body *or* making a particular disposition" of his share. Held, that "or" must be read "and," and that the children took in fee, but that the gift over in the event of making no disposition was repugnant and void. *Greated* v. *Greated.* 621

ORDER.
See DECREE.
MINUTES.

OTHER.
See SURVIVOR.

OUTLAWRY.
A Plaintiff was outlawed pending the suit. Held, that it was irregular to make the Attorney-General a party in respect of the outlawry, unless a question was raised with regard to its validity or enforcement. *Bromley* v. *Smith.* 644

PALATINE COURT.
See JURISDICTION, 1, 2.

PARENT.
See CHILDREN.
ISSUE.

PARENT AND CHILD.
1. A testator bequeathed a sum to trustees for his daughter for life, and afterwards to pay the dividends to her husband, "during his life, nevertheless to be by him applied for or towards the maintenance, education or benefit" of the daughter's children. There was a gift to the children after the decease of the survivor of the daughter and her husband. Held, that the husband took for life beneficially. *Byne* v. *Blackburn.* Page 41

2. A husband being held liable at the suit of the children of his wife's first marriage to replace trust funds received by him, claimed a large sum expended in maintaining, &c. the children after the second marriage. The claim was disallowed. *Grove* v. *Price.* 105

3. Where both a parent and his children are objects of a bequest of personalty, the tendency of modern decisions is, to construe the limitations as a gift to the parent for life, with remainder to his children. *Audsley* v. *Horn.* 195

4. A gift by a child to her parent immediately after attaining twenty-one cannot, under ordinary circumstances, be supported. *Bury* v. *Oppenheim.* 594

5. Soon after attaining twenty-one a daughter sold her reversionary interest and the amount was received by her father. He said she had determined that the most advantageous course for her to adopt would be to give the money to him to be applied by him in improving and extending his business, in order to increase his estate, and to enable him better to provide for his family after his decease, and she accordingly gave him the money. Held, that the father was a trustee of the money for the daughter, and he was bound to repay it. *Bury* v. *Oppenheim.* Page 594

PARTITION.

A partition decreed without a commission, in a case in which infants were interested, upon satisfactory evidence of the value. *Greenwood* v. *Percy.* 572

PARTNERSHIP.

Several persons, who were jointly entitled to several leases of a colliery, worked it in copartnership. Held, on a dissolution, that one of the co-owners of the leases could not insist on a partition, though there might be no debts, but that the whole must be sold. *Wild* v. *Milne.* 504

PAYMENT OF INTEREST.

See STATUTE OF LIMITATION, 2.

PENSION.

See EAST INDIA COMPANY.

PLEADING.

In a foreclosure suit, the parties to the mortgage deed and those claiming under them ought alone to be made parties. *Audsley* v. *Horn.* Page 195

See DISCLAIMER.
FRAUD ON POWER.
OUTLAWRY.
SPECIFIC PERFORMANCE.
SUIT ON BEHALF, ETC.

POACHING.

See PUBLIC POLICY.

POLICY OF ASSURANCE.

1. An expectant heir mortgaged his reversionary estate, and, as a further security, he covenanted to keep up policies on his life, which, on his default, the mortgagees were empowered to do, and he covenanted to pay the amount and charged it on his reversion. On setting aside the transaction for inadequacy of consideration, the mortgagees were not allowed premiums paid by them under the security. *Bromley* v. *Smith.* 644

2. One of the conditions of a life policy was, that it should be void if the assured died by his own hand, except it should have been assigned to other parties, for valuable consideration, six months before his death. Held, that a letter to *A. B.* charging *A.* with a floating balance due to him, and made three years previous to the death of the assured by his own hand was within the exception. *Jones* v. *The Consolidated Investment Assurance Company.* 256

See DEBTOR AND CREDITOR.

POSSESSION.

See VENDOR AND PURCHASER.

POWER.

1. A power to appoint the "interest" of a fund, held to authorize the appointment of the capital, notwithstanding subsequent powers over and limitation of the said "trust moneys" and the "interest." *Phillips* v. *Brydon.* Page 77
2. Power to appoint to children, "with such directions or regulations for maintenance, education and advancement as their mother should appoint." The mother appointed the income to the children's father until the youngest attained twenty-one, "in or towards the maintenance and education" of all her children. Held, that the appointment was invalid. *Lloyd* v. *Lloyd.* 96
3. By the settlement of *A. B.*, and in the events which happened, two-thirds of the fund was limited to certain persons, and three-fifths to the children of *C. D.* "living at the time of the decease of *C. D.*" and in default, to *C. D.'s* next of kin. Power was given to *A. B.* to revoke these trusts, and to appoint the trust fund among the persons who, under the trusts aforesaid, would have become entitled to the funds, "in the proportion and manner aforesaid, or in such manner and form, in all respects, as *A. B.* should think fit." *A. B.* appointed to a child of *C. D.*, who survived *A. B.*, but died in the life of *C. D.* Held, that such child was not an object of the power. *Denning* v. *Ellerton.* Page 231

See ESTATE FOR LIFE, 1.
EXECUTION OF POWER.
FRAUD ON POWER.
RELEASE OF POWER.

POWER OF SALE.

An estate was devised to trustees for different persons in fifth shares, some of which shares were given to living persons absolutely, and the others to living persons for life, with remainder to their children in fee. An unlimited power of sale over the whole estate was given to the trustees. Held, that this power of sale was valid and could be exercised over the whole estate, so long as any of the trusts of any of the shares remained to be performed. *Taite* v. *Swinstead.* 525

PRACTICE.

The Court cannot, under the 15 & 16 *Vict.* c. 86, s. 44, appoint a person to represent the estate of a deceased person who is not willing to act. *Hill* v. *Bonner.* 372

See CHARGING ORDER.
COSTS.
CREDITORS' REPRESENTATIVE.
CROSS-EXAMINATION, 1, 2.
DECREE, 1, 2, 3.
DISMISSAL FOR WANT OF PROSECUTION.
INJUNCTION.
JURISDICTION.
JURY.
MINUTES.
OPENING BIDDINGS.
PARTITION.
PRODUCTION OF DOCUMENTS.

See SALE UNDER COURT.
SECURITY FOR COSTS.
SPECIFIC PERFORMANCE.
STAYING SECOND SUIT.
SUBPŒNA TO APPOINT SOLICITOR.
SUBSTITUTED SERVICE.
TAXATION.

PRIORITY.

See ADMINISTRATION OF ASSETS.
COSTS, 4.
EXONERATION.
MORTGAGE, 3.

PRODUCTION OF DOCUMENTS.

A solicitor and his client were both Defendants. The solicitor admitted documents in his possession belonging to his client, but claimed privilege; the client made no admission as to possession of these documents. Upon an application in the presence of both, the Court made an order for production. *Gaskell* v. *Chambers*. (No. 2.) Page 303

See SOLICITOR AND CLIENT.

PROTECTION ORDER.

1. A wife obtained an order for protection under the 20 & 21 *Vict.* c. 85, s. 21. Held, that she was entitled to payment of a fund in Court representing a legacy bequeathed to her. *In re Kingsley's Trust*. 84

2. A wife was deserted by her husband. Afterwards, her father bequeathed a fund for her separate use, without power of anticipation, and she subsequently obtained a protecting order under the 20 & 21 *Vict.* c. 85, s. 21. Held, that she was entitled to payment. *Cooke* v. *Fuller*. Page 99

PUBLIC COMPANY.

Directors of a company were alleged to have paid calls merely on a small portion of the shares for which they had subscribed the deed, and they had also, out of the company's funds, purchased part of the chairman's shares, and had cancelled a considerable number of those subscribed for by him and by themselves. This not being authorized by the constitution of the company or by the provisions of the deed of settlement: —Held, that it was not a matter of internal management to be confirmed by a general meeting, and a demurrer to a bill to make the directors liable was therefore overruled. *Hodgkinson and Others, on behalf, &c.* v. *The National Live Stock Insurance Company and Others*. 473

See BREACH OF TRUST, 3, 4.
CALLS.
COMPANY.
CONTRIBUTORY.
CREDITORS' REPRESENTATIVE.
CROSS BILL.
WINDING UP.

PUBLIC POLICY.

Bequest for purchasing the discharge of poachers, "committed to prison for non-payment of fines, fees or expenses under the Game Laws:" Held void, as encouraging offences and opposed to public policy. *Thrupp* v. *Collett*. (No. 1.) 125

RAILWAY.

1. A railway company gave notice to a tenant at will to take part of the lands, and they were allowed to take possession and complete their line. Afterwards, a person, who had subsequently to the notice purchased one-ninth of the land, filed a bill, merely praying an injunction to restrain the railway company from entering upon, continuing in possession of, or otherwise interfering with the land. The bill was dismissed, with costs. *Carnochan* v. *The Norwich and Spalding Railway Company.* Page 169

2. A railway company took some lands belonging to an ecclesiastical corporation, which at the time was let on lease, and a large sum was awarded as a compensation, on the principle of the lessee continuing to pay the rent reserved by his lease. The land being valuable for building purposes, and it being the custom of the corporation to make it available, by accepting surrenders and re-granting building leases at a great advance of rent, the Court, on the evidence, Held, that the corporation was entitled to the dividends on the compensation money, in addition to the rent during the term granted by the lease. *Re the Dean and Chapter of Westminster. Re The Hampstead Junction Railway Company.* 214

See LANDS CLAUSES ACT.

REAL AND PERSONAL ESTATE.

See COSTS, 4.

See CONVERSION.

EXONERATION.

RECEIVER.

See ACT OF PARLIAMENT, 1.

RECTIFYING DEED.

See REFORMING DEED.

REDEMPTION.

See BUILDING SOCIETY, 4.

REFERENTIAL TRUSTS.

1. Bequest to the children of a deceased niece who should be living at the testator's death, followed by a bequest to a nephew for life, and after his decease, upon the like "trusts" for the benefit of his issue, and subject to the same powers, "limitations," &c. in respect to his issue as those expressed as to the niece's children. The nephew had no child living at the testator's death, but he afterwards had one child born. Held, that such child was entitled to the second legacy. *Yardley* v. *Yardley.* Page 38

2. A father, having eight children, devised his estate to six of them equally. Afterwards, the wife's father devised another property unto her children, to be vested at the like times, with like benefit of survivorship and provision for maintenance, and in like manner, in all other respects, so far as the nature of the property and the difference of tenure would permit, as the said children were entitled to the estate of their father under the dispositions and limitations

contained in his will: Held, that the eight children participated in the second devise. *Pigott* v. *Wilder*. Page 90

See WILLS.

REFORMING DEED.

Prior to a mortgage, the mortgagee's valuer included certain articles in his valuation, and which the mortgagees expected would be comprised in their mortgage, but they were omitted from the deed. A bill to rectify the deed, by including them, was dismissed, there being no proof of a common mistake of mortgagor and mortgagees. *The Metropolitan Counties, &c. Society* v. *Brown*. 454

REGISTRAR.

See DECREE, 3.

RELEASE OF POWER.

A father had an exclusive power of appointment in favor of his children over a fund, which, in default, was limited to them equally, and, as representative of a deceased son, he was, in default of appointment, beneficially entitled to one-third of the fund. The father released the power to his mortgagees: —Held, that the power had been effectually destroyed, and the Court declared the rights of the parties consequent on such destruction. *Smith* v. *Houblon*. 482

REMOTENESS.

1. Bequest to a living person for life, and afterwards to his children, followed by a declaration that these interests should be considered vested interests at the age of twenty-five, and a gift over to the issue of any dying under twenty-five: Held, too remote. *Rowland* v. *Tawney*. Page 67

2. A testator gave his residuary estate to his daughter for life, and afterwards to her two sons *Henry* and *Charles*, and all other her children thereafter to be born, and the issue of his grandchildren, who, being a son, should attain twenty-one, or being a daughter, should attain that age or marry with consent, equally to be divided, such issue to take a parent's share: Held void for remoteness. *Webster* v. *Boddington*. 128

3. Distinction between a bequest having two alternatives, one of which is valid and the other too remote, and a gift depending on the failure of a previous limitation, which is too remote. *Re Thatcher's Trusts*. 365

4. The case of *Taylor* v. *Frobisher*, 5 De Gex & Sm. 191, approved of. *Ibid.*

5. Bequest to *A.* for life, and afterwards to her children equally, "to be vested" on such as should attain twenty-five, and "to be payable" as soon as might be after that age should be attained, with powers of maintenance and advancement out of their "vested or expectant portions," with a gift over to *B.* if no child should attain twenty-five: Held, first, that the gift to the children was too remote, and secondly, on *A.*'s

death without having been married, that the gift to *B.* could not take effect, as an alternative limitation to a person in esse at the date of the will. *Re Thatcher's Trusts.* Page 365

See ABSOLUTE INTEREST.
POWER OF SALE.

RENT-CHARGE.

A sale of lands decreed to raise arrears of a rent-charge granted with powers of distress and entry, there being nothing to distrain on, and there being twenty other concurrent rent-charges with like remedies. *Cupit* v. *Jackson* (13 *Price*, 721) followed. *White on behalf of, &c.* v. *James.* (No. 2.) 191

REPRESENTATIVE.

See PRACTICE.

RESIDUARY DEVISE.

See ADMINISTRATION OF ASSETS.

RESIDUE.

1. A testatrix, after reciting that she was entitled to a legacy of 1,000*l.* under her husband's will, gave the 1,000*l.*, as to 100*l.*, part thereof, to *A.*, as to 400*l.*, part thereof, to *B.*, and as to all the residue of the said legacy of 1,000*l.* and all the residue of her estate, to *C.* At the death of the testatrix, 216*l.* only were due on the legacy. Held, that *A.*, *B.* and *C.* must abate in proportion. *Wright* v. *Weston.* 429

2. A testatrix, who was entitled to half of her sister's residuary estate, bequeathed a large legacy, which, if it should fail, she directed should fall "into her own estate." She bequeathed the residue of her property (except that derived from her sister) to *A.*, and the residue of her property derived from her sister's estate to *B.* Held, that the latter must contribute with the former towards payment of the debts, expenses and legacies. *Greenwood* v. *Jemmett.* Page 479

3. "Residue" is not a "legacy" in the ordinary sense of the term, though the person taking it is a "residuary legatee." *Ward* v. *Grey.* 485

4. The 1 *Will.* 4, c. 40 (as to the right of executors to the undisposed of residue), merely shifts the burden of proof from the next of kin to the executor. *Read* v. *Stedman.* 495

5. Devise and bequest of residue of testator's property to *A.*, *B.* and *C.*, "upon trust" to convert and pay debts and certain legacies. The testator, in a subsequent clause appointed *A.*, *B.* and *C.* his executors, and he died without next of kin. Held, that the Crown, as against the executors, was entitled to the undisposed of residue. *Ibid.*

REVERSION.

See EXPECTANT HEIR.
POLICY.
REVERSIONARY INTEREST.

REVERSIONARY INTEREST.

1. The purchase of a reversion cannot stand in equity unless the purchaser shews that he paid the full

value for it. *Salter* v. *Bradshaw*. *Bradshaw* v. *Salter*. Page 161

2. The sale of a reversion set aside after forty years, the vendor having instituted proceedings for that purpose a year after it fell into possession, and the purchaser having failed to prove that he had paid full value for it. *Ibid.*

3. The general rule is this :—Where a person deals with an expectant heir for his reversion, the burden of proof lies upon such person to prove the fairness of the transaction. *Bromley* v. *Smith*. *Boustead* v. *Bromley*. *Smith* v. *Bromley*. 644

4. The application of the rule is not prevented, (i) by the fact that the transaction was a charge and not a sale; nor (ii) that the expectant heir was a person of mature age; nor (iii) that he perfectly understood the nature and extent of the transaction; nor (iv) is it necessary for the heir to shew that he was in pecuniary distress at the time. *Ibid.*

SALE.

See BANKRUPT.
PARTNERSHIP.
RENT-CHARGE.

SALE UNDER COURT.

On a sale under the Court, two persons agreed not to bid against each other, but that one should bid up to 1,500*l.* and divide the lot between them. They bought it for 650*l.* Held, that this agreement furnished no ground for opening the biddings, or annulling the sale. *In re Carew's Estate.* Page 187

SCHOOL.

See CHARITY.

SECURITY.

See BANKERS.

SECURITY FOR COSTS.

A motion, under the 20 & 21 *Vict.* c. 14, s. 24, that a limited liability company might give security for costs, on an affidavit that the company had ceased all operations, that proceedings had been taken to wind it up, that the plant had been sold, and that the company was "insolvent and unable to pay its debts already incurred," refused, the Court not feeling satisfied that the assets of the company would be insufficient to pay the Defendant's costs. *Caillaud's Patent Tanning Company (Limited)* v. *Jean Caillaud.* 427

SEPARATE USE.

See HUSBAND AND WIFE.
PROTECTION ORDER.

SERVANTS.

Under a bequest to the testator's "servants in his service at the time of his decease," the Court held, that two out-door servants, continuously employed at weekly wages, were entitled, but that a boy employed a few months in the

year, whilst the testator was at his country residence, at weekly wages, to carry letters to the post, and was so employed at the testator's death, was not entitled. *Thrupp* v. *Collett* No. 2.
Page 147

SERVICE OF BILL.
See SUBSTITUTED SERVICE.

SET-OFF.
A husband, being held liable at the suit of the children of his wife's first marriage to replace trust funds received by him, claimed a large sum expended in maintaining, &c., the children after the second marriage. The claim was disallowed. *Grove* v. *Price.* 105
See BREACH OF TRUST, 1.

SETTING ASIDE DEED.
See REVERSIONARY INTEREST.

SETTLED ESTATES ACT.
1. The effect and operation of the Settled Estates Act (19 & 20 *Vict.* c. 120) explained. *Grey* v. *Jenkins.* 551
2. The expression "persons entitled," in the Settled Estates Act, means persons beneficially entitled, and all persons beneficially entitled must concur. Trustees can only consent for unborn children, but trustees with a power of sale may join in a sale which will bind all persons claiming under their trust. *Ibid.*

SETTLEMENT.
See POWER, 3.
VOLUNTARY SETTLEMENT.

SEVERANCE OF DEFENCES.
Two trustees, who severed in their defences, were allowed one set of costs only. One of them, by his answer, imputed misconduct to the other, which rendered it necessary for him to sever, and he asked for the whole costs. The Court being unable, on the answers, to determine the question, left the division to the Taxing Master. *Course* v. *Humphrey.* Page 402

SHARES.
See CALLS, 1, 2.

SHIP.
A. and *B.* were co-owners of a ship, which had been chartered for a voyage. *A.* assigned his share of the freight to C., who gave no notice of it to *B.*, and both the ship and freight were afterwards insured by the ship broker, according to the ordinary course of dealing between *A.* and *B.* Held, that *C.* must bear his share of the wages of the crew, and the expenses of the insurance of the ship and freight. *Lindsay* v. *Gibbs.* (No. 2.) 51

SOIL.
The word "soil" in an Inclosure Act held to mean "surface." *Pretty* v. *Solly.* 606

SOLICITOR AND CLIENT.
Solicitors employed by the husband to prepare a marriage settlement, Held, not bound to produce it to the trustees until their bill had been paid. *Re Gregson.* 87

See TAXATION.
PRODUCTION OF DOCUMENTS.

SON.

See DEVISE.
WILL, 2.

SPECIFIC LEGACY.

See ADMINISTRATION OF ASSETS.
CALLS, 1, 2.

SPECIFIC PERFORMANCE.

1. A vendor filed a claim for specific performance, and gave notice of motion for a decree. The Defendant did not appear, and a decree was made against him, directing a specific performance, without any reference as to title. Subsequently, upon the motion of the Defendant, the Court allowed a reference as to title to be inserted in the decree, upon his paying all the costs of the application. *Hughes* v. *Jones*. Page 24
2. A contract for the sale of land provided, that one party was to be consulted on any houses proposed to be built thereon by the other, and in case of difference, that *A.* and *B.*, or their nominees, should have power to decide any such question. There having been no decision, Held, that this Court could not specifically perform the contract. *Tillet* v. *The Charing Cross Bridge Company*. 419
3. Bill by purchaser against the vendor, who had previously executed a voluntary settlement of the property, and against the trustees and *cestuis que trust* under the settlement to have the settlement declared void and delivered up, and for a specific performance, sustained, the only objection to the title being the voluntary settlement. *Daking* v. *Whimper*. Page 568
4. In *June*, 1846, *A.* agreed to sell his share in a mine to *B.*, and four months afterwards he agreed to sell it to *C.*, and paid part of the purchase-money. In the month following, *A.* having given notice to *B.* that he repudiated the first contract, he conveyed it to *C.* No steps were taken by *B.* for ten and a-half years, when a suit was instituted against *C.* alone to have a declaration that *C.* was a trustee, and for a conveyance. Held, that the right was barred by lapse of time and laches. Held, also, that the result would have been the same if the subject had been ordinary instead of mining property. *Alloway* v. *Braine*. 575
5. A specific performance will not be decreed after a delay of ten years, when nothing has been done in the meantime. *Ibid.*
6. Specific performance of a contract for sale of lands held under an Inclosure Act refused, it appearing upon the context that the right of the lord to the minerals in the allotted lands had not been affected by the act. *Pretty* v. *Solly*. 606

See ARBITRATORS.
BREWERS' LEASE.
GOODWILL.
STATUTE 17 & 18 VICT. c. 125, ss. 1, 2.
UNCERTAINTY.

STATUTE OF LIMITATIONS.

1. A testator died in 1818. *A. B.*, his administrator, received assets and placed them in a bank, to an account — "*A. B.*'s trustee," and where they still remained. *A. B.* died in 1853, and to a suit instituted by the adminstrator *de bonis non* of the original testator against the representatives of *A. B.* and the bankers, to recover the fund, the representatives of *A. B.* set up the Statute of Limitations, but the bankers were willing to pay the amount. Held, that the statute was inapplicable, and a decree was made for the Plaintiff. Held, also, that in such a suit, the representatives of *A. B.* conld not be charged with interest. *Smith* v. *Acton.* Page 210

2. On the death of a mortgagor in 1833, his widow (who was entitled to dower) took possession of the mortgaged estate, with the consent of the co-heirs, and she paid interest on the mortgage. In 1858, the mortgagee instituted a suit to realize his mortgage, in which it did not appear that any interest had been paid by one of the co-heirs during the interval. Held, that the payment of the interest by the widow prevented the statute running, for either such co-heir was himself barred, or the payment of interest had been made on his behalf. *Ames* v. *Mannering.* 585

3. In taking the accounts in an administration suit, any creditor may object that another creditor's debt is barred by the Statute of Limitations; but *semble*, that such an objection cannot be taken to the Plaintiff's debt, which is the foundation of the decree. *Fuller* v. *Redman.* (No. 2.) Page 614

4. A mere letter of licence by a creditor to his debtor does not suspend the operation of the Statute of Limitations. *Ibid.*

5. An acknowledgment to take a case out of the Statute of Limitations must be made to the creditor; and, *semble*, that one to his agent is sufficient. *Ibid.*

STATUTES.

1. Parties entered into a contract to purchase a brewery and plant at a price to be fixed by arbitrators, who were to choose an umpire before entering upon the valuation. The arbitrators could not agree on an umpire. Held, that the Court had no authority, under the 17 & 18 *Vict.* c. 125, ss. 1, 2, to appoint an umpire for such a purpose. *Collins* v. *Collins.* 306

2. Rules of construing statutes, where a general enactment in it would override a particular one, and where two parts of it are contradictory. *Pretty* v. *Solly.* 606

4 & 5 *Will. & Mary*, c. 20.
See DEVASTAVIT.

1 *Will.* 4, c. 40.
See RESIDUE, 4, 5.

6 & 7 *Will.* 4, c. 32.
See BUILDING SOCIETY.

1 *Vict.* c. 26.
See ADMINISTRATION OF ASSETS.

2 & 3 *Vict.* c. 11.
See DEVASTAVIT.

8 & 9 *Vict.* c. 18, s. 80.
See LANDS CLAUSES ACT.

15 & 16 *Vict.* c. 86, s. 44.
See PRACTICE.

17 & 18 *Vict.* c. 113.
See MORTGAGE, 4.

20 & 21 *Vict.* c. 14, s. 24.
See SECURITY FOR COSTS.

20 & 21 *Vict.* c. 78.
See CREDITORS' REPRESENTATIVE.

20 & 21 *Vict.* c. 85, s. 21.
See PROTECTION ORDER.

21 & 22 *Vict.* c. 27, s. 2.
See JURY.

See ACT OF PARLIAMENT.
ARBITRATOR.
DEBENTURE.
INCLOSURE.
JURY.
MUNICIPAL CORPORATION.
STATUTE OF LIMITATIONS.
SETTLED ESTATES ACT.
TRUSTEE ACT.

STAYING SECOND SUIT.

The common administration decree having been made in a suit by one of the next of kin, a second suit was instituted, six months after, by another next of kin, praying additional relief. The Court stayed the second suit, on the Defendant in the first undertaking not to object to any additions to the decree which the Judge in Chambers might think reasonable. *Gwyer* v. *Peterson*. *Peterson* v. *Peterson*. Page 83

STAYING PROCEEDINGS.

See JURISDICTION, 1, 2.

STOCK.

1. *South Sea* Stock and £3 : 5*s.* per Cents. held, on the context, to pass by the expression "surplus money." *Newman* v. *Newman*. (No. 1.) Page 218

2. A testator bequeathed specific sums of *South Sea* Stock and £3 : 5*s.* per Cents. to his sister for her life, and, at her death, she left "this money in trust to her neice," to pay certain legacies, which did not exhaust the whole. She authorized her sister and niece (who were her executrixes) to sell out the residue of "her money" in the £3 : 5*s.* per Cents. over the sum she had mentioned, for payment of her debts, and proceeded: "then, if there is any surplus money, I give it to my niece." Held, that the niece took the surplus of both the funds. *Ibid.*

3. Stock in the funds, in which the testator has a reversionary interest, will not pass by a bequest of "my goods and furniture, my plate and linen, all money and notes that may be due to me at my decease." *Cowling* v. *Cowling*. 419

SUBPŒNA TO APPOINT SOLICITOR.

The Defendant's solicitor died, and the Plaintiff (being unable to find the Defendant) could not proceed in the accounts directed by the decree. The Court ordered sub-

sequestered service of a subpœna to name a new solicitor, and the Defendant having failed to appoint one, the Court directed the accounts to be taken in his absence. *Dean* v. *Lethbridge*. Page 237

SUBSTITUTED SERVICE.

A company, though not formally dissolved, had practically ceased to exist, and had no office or officers. The company being made Defendants in a suit, the Court ordered that service of the bill on the late chairman and the secretary should be good service on the company. *Gaskell* v. *Chambers*. (No. 1.) 252

SUBSTITUTIONARY LEGACY.

1. Bequest to my niece and such of my nephews and nieces as shall be then living, and the children of such of them as shall be then dead, such children to be entitled only to the part of their parents. Held, that the children of a nephew who died in the life of the testatrix participated. *Re Faulding's Trust*. 263
2. Rules for construing gifts by substitution. *King* v. *Cleaveland*. 26
3. Gift to one for life, and after his decease, to his children "then living, or their legal personal representatives, share and share alike." Held, that the representatives took as a distinct class and not by substitution, and that the representatives of children who died in the lifetime of the testator, and of those who were dead at the date of the will, participated. *King* v. *Cleaveland*. Page 26

SUIT ON BEHALF, &c.

Suit by a grantee of a rent-charge on behalf of himself and twenty others to raise the arrears by sale, sanctioned. *White* v. *James*. 191

SURVIVOR.

A testator devised freeholds to two and their heirs as tenants in common, and in case either should die without leaving lawful issue surviving her, then he devised her part "unto the survivor." Held, that "survivor" was to be read in its ordinary sense, and not in the sense of "other." *Greenwood* v. *Perry*. 572

TACKING.

Two sums were due to *A.* from *B.*, one on mortgage of lands, and the other by covenant. *A.* having brought action for both sums, *B.* paid the amount due on the mortgage into Court. *A.* took this sum out of Court, and he proceeded in the action and recovered a judgment on the covenant. Held, that the mortgage having been satisfied before the judgment had been obtained, *A.* had no right to tack his judgment. *The Mayor, &c. of Brecon* v. *Seymour*. 548

See DEBTOR AND CREDITOR.

TAXATION.

1. A client presented a special peti-

tion for the taxation of his solicitor's bill, complaining that the solicitor had taken reckless proceedings, and praying that the costs of them might be wholly disallowed on taxation. A special petition was held to be unnecessary, and the Petitioner was ordered to pay the costs of it. *Re Atkinson and Pilgrim.* Page 151

2. One of several Defendants appealed, substantially, from the whole decree, and the appeal was dismissed with costs. Held, on taxation, that the same fees on the Plaintiff's briefs which had been allowed on the original hearing ought to be allowed on the appeal. Held, also, that the length of the interval between the two hearings ought not to vary the amount. *Sturgis* v. *Morse.* (No. 2.) 562

See SEVERANCE OF DEFENCES.

TENANT FOR LIFE.

Bequest "to *A.* and her children," expressed in another part of the will as a gift "to *A.* and her family." Held, that *A.* took for life. *Ward* v. *Grey.* 485

TENANT FOR LIFE AND REMAINDERMAN.

See FINES (ADMISSION).

TITLE DEEDS.

See LIEN.

TRADE MARK.

1. The Defendant innocently used the Plaintiff's trade-marks, and, on being served with the bill, he removed the labels, and gave an undertaking not to sell any more, but refused to pay the costs. The suit was continued to a hearing, and the account of profits, which were very trifling, was waived:—Held, that the Defendant must pay the whole costs of suit. *Burgess* v. *Hills.* Page 244

2. A suit was instituted to restrain the user of a trade mark, and for an account. No application was made to the Defendant before suit, and the Defendant said he would have desisted if applied to. At the hearing, the account was abandoned, but a perpetual injunction was granted:—Held, that the Defendant must pay the costs. *Burgess* v. *Hately.* 249

TRUSTEE.

Trustees of a charity were disqualified on "departing the United Kingdom, from whatever cause or motive, or under whatever circumstances:" Held, that a temporary absence abroad was not within the proviso. *In re The Moravian Society.* 101

See BREACH OF TRUST.
HUSBAND AND WIFE, 1.
INFANT.
NEW TRUSTEE.
PARENT AND CHILD, 5.
SEVERANCE OF DEFENCE.
STATUTE OF LIMITATIONS, 1.

TRUSTEE ACT.

When an order is made under the Trustee Act, to be acted on by the Bank of England, the order should

shew that the case comes within the act. *In re Mainwaring.* Page 172

UNCERTAINTY.

1. Specific performance of an agreement to purchase one-third of a foundry refused, on the ground of uncertainty; the contract not specifying what portion of the purchase-money was to be left in the business, but only a "large portion," and not stating when it was to be paid, or how to be secured, and what interest was to be allowed in the meanwhile. *Cooper* v. *Hood.* 293

2. Gift to "my grandchildren and their issue as shall stand, in respect to me, in equal degree of consanguinity." Held, not void for uncertainty, the sentence being read in the alternative. *Maynard* v. *Wright.* 285

See GOODWILL.

UNIVERSAL HEIR.

See FEE SIMPLE.

VENDOR AND PURCHASER.

Agreement for the sale of a lease, "with possession on the 1st of *December*, the rent to commence at *Christmas*." Possession was not given until the 31st of *January*, through the default of the vendor. Held, that the purchaser was entitled to compensation, and an inquiry was directed. *Gedye* v. *The Duke of Montrose.* 45

See BREWERS' LEASE.
BREACH OF TRUST, 4.
CONDITIONS OF SALE.
GOODWILL.
LIEN FOR PURCHASE-MONEY.
OPENING BIDDINGS.
SALE UNDER COURT.
SPECIFIC PERFORMANCE.
UNCERTAINTY, 1.

VOLUNTARY SETTLEMENT.

1. Voluntary gift of leaseholds by a father to his sons, in 1835 and 1841, set aside, it being ascertained, on a reference, that at those periods the settlor's debts exceeded his assets. *Christy* v. *Courtenay.* Page 140

2. When a voluntary settlement of lands is avoided by a subsequent sale for valuable consideration, the volunteers have no equity against the purchase-money payable to the settlor. *Daking* v. *Whimper.* 568

See COSTS, 1.

WARD OF COURT.

A ward of Court married ten days after attaining twenty-one. The Court declined ordering her fortune to be paid out of Court, on her consent, but directed it to be settled. *Biddle* v. *Jackson.* 282

WASTE.

See LANDLORD AND TENANT.

WILL.

1. *A.* devised property to the children of *B.*, in like manner as they were

entitled under the "will" of *B.* (deceased): Held, that *A.* referred to the will and codicils together of *B.* *Pigott* v. *Wilder.* Page 90

2. The word "son" is quite as flexible as the word "heir," and can as easily be read "issue male" as the word "heir" can be turned into "son." *Jenkins* v. *Lord Clinton.* 108

See ABSOLUTE INTEREST.
ACCUMULATION.
ADMINISTRATION OF ASSETS.
ANNUITY.
APPURTENANCES.
BEQUEST.
CALLS.
CHARITY.
CHILDREN.
CONTRIBUTION.
CONVERSION.
COSTS, 4.
CUMULATIVE LEGACIES.
DEVISE.
DONATIO MORTIS CAUSA.
EJUSDEM GENERIS.
EQUITABLE ASSETS.
ESTATE FOR LIFE.
ESTATE TAIL.
EXECUTION OF POWER.
EXONERATION.
FEE SIMPLE.
FORFEITURE.
ILLEGITIMATE CHILD.
ISSUE.
LEGACY.
LEGAL PERSONAL REPRESENTATIVES.
LEGATEE.
MONEY.
See MORTGAGE, 1, 2, 4.
"OR" READ "AND."
PARENT AND CHILD, 1, 3.
POWER OF SALE.
PUBLIC POLICY.
REFERENTIAL TRUSTS.
REMOTENESS, 1, 2, 3, 4, 5.
RESIDUE.
SERVANTS.
STOCK, 1, 2, 3.
SUBSTITUTIONARY LEGACY.
SURVIVOR.
UNCERTAINTY, 2.

WILLS ACT.

See ADMINISTRATION OF ASSETS.

WINDING UP.

A company established in 1853, had since carried on its business at a loss in every year, amounting in the whole to 6,507*l.* There were irregularities in the management, the directors had not paid for shares subscribed for by them, interest had been paid out of capital, and the balance at the bankers had been reduced to 300*l.*; on the other hand, the calls on the shares had hitherto been one-fifth only: Held, by the *Master of the Rolls* and the *Lords Justices* (on appeal) that there was no case for winding it up. *In re The National Live Stock Insurance Company.* Page 153

See CONTRIBUTORY.
CREDITORS' REPRESENTATIVE.

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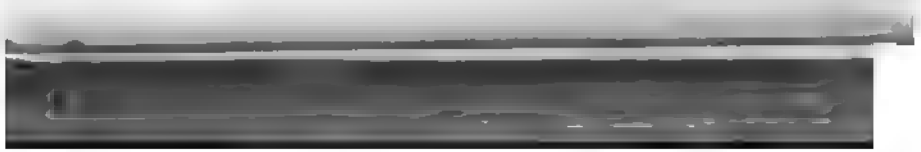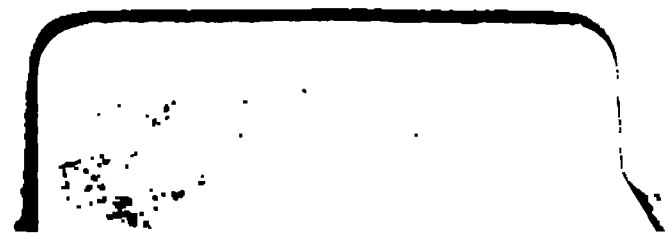
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